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(982)

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 41

JOHN W. JOHNSON, Superintendent of Public Works of the State of New York,

*Appellant,*

v.

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## JURISDICTIONAL STATEMENT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

**No.** .....

JOHN W. JOHNSON, Superintendent of Public Works of the State of New York,

*Appellant,*

v.

TUSCARORA NATION OF INDIANS, als[illegible] as TUSCARORA INDIAN NATIO[illegible]

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States Court of Appeals for the Second Circuit entered on July 24, 1958, as modified by order dated August 26, 1958 vacating and annulling the proceedings taken by the appellant to appropriate the property involved herein and staying the appellant from entering upon or damaging appellee's lands. The appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## Opinions Below

The opinion of the Court of Appeals for the Second Circuit, dated July 24, 1958, is as yet unreported. A copy thereof is annexed hereto as Appendix A. The opinion of the District Court for the Western District of New York, dated June 24, 1958, is also as yet unreported. A copy of the latter opinion is annexed hereto as Appendix B.

## Jurisdiction

This suit is brought under 28 U. S. C. §§ 1331, 2201 and 2202 for a declaratory judgment wherein plaintiff-appellee prays

(1) That it have a judgment and decree defining its rights and status, and particularly adjudicating that neither the defendant-appellant nor his co-defendants have any right, authority or power to acquire, or attempt to acquire, by appropriation or otherwise, any or all of the lands belonging to appellee within the Tuscarora Reservation;

(2) That a temporary restraining order be granted;

(3) That a permanent injunction be granted; and

(4) That all descriptions, maps, notices and other instruments in connection with the appropriation be set aside, vacated and annulled.

The judgment of the Court of Appeals was entered on July 24, 1958, and notice of appeal was filed in that Court on September 3, 1958. The jurisdiction of the Supreme Court to review the decision by appeal is conferred by 28 U. S. C. §§ 1254(2) and 2101(c). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment of the Court of Appeals in this case:

*Public Service Comm.* v. *Batesville Tel. Co.*, 284 U. S. 6 (1931); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275 (1946). See also, *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921).

## Questions Presented

(1) Is the exercise of the sovereign power of eminent domain by the State of New York as to Indian reservation lands repugnant to 25 U. S. C. §§ 177 and 233?

(2) Is acquisition of title by eminent domain under the procedure set forth in New York State Public Authorities Law, Art. 5, Tit. 1, § 1007 and New York State Highway Law, § 30 repugnant to 16 U. S. Code § 814 (Federal Power Act § 21)?

## Statutes Involved

Indian Non-Intercourse Acts of July 22, 1790 (1 Stat. 138), § 4, of March 1, 1793 (1 Stat. 330), § 8, and of June 30, 1834 (4 Stat. 729), § 12; 25 U. S. C. § 177 (formerly Rev. Stat. § 2116); 25 U. S. C. § 233; 16 U. S. C. § 814; New York State Public Authorities Law, Art. 5, Tit. 1, § 1007; New York State Highway Law, § 30. The foregoing are set forth in Appendix C annexed hereto.

## Statement

The facts involved, for the purposes of this appeal, are simple. Pursuant to the provisions of New York Public Authorities Law, Art. 5, Tit. 1, § 1007(10) the State of New York acquired title to the lands involved herein. The lands were part of the Tuscarora Reservation lying at or near the Niagara River in the Western District of New York. In acquiring title by eminent domain the State

utilized, as statutorily authorized, the appropriation method set forth in New York Highway Law, § 30.

The validity of the State's acquisition was predicated upon two factors: (1) That the acquisition was an exercise by the State of its inherent sovereign power of eminent domain, limited only by the State and Federal constitutional provisions respecting public use, due process and just compensation, but not otherwise limited; and (2) That the method pursued by it in effecting the acquisition was in no way repugnant to, but actually in furtherance of, federal statute.

As to the first premise, it seems almost superfluous to observe the fundamental proposition that the power of eminent domain is an attribute of sovereignty,—an inherent sovereign power which is necessary to the very existence of the government. (*Kohl* v. *United States*, 91 U. S. 367, 371-372 [1875]; *United States* v. *Jones*, 109 U. S. 513, 518 [1883]; *Beekman* v. *Saratoga & S. R. Co.*, 3 Paige 45, 22 Am. Dec. 679 [N. Y., 1831]; *People* v. *Fisher*, 190 N. Y. 468, 474, 83 N. E. 482 [1908].) It comes into being *eo instante* with the establishment of the government and continues as long as the government endures. (*United States* v. *Cooper*, 9 Mackey 104; *United States* v. *Finn*, 127 F. Supp. 158, 167 [S. D. Cal., 1954].) It does not require recognition by constitutional provision, but exists in absolute and unlimited form. (*Adirondack R. Co.* v. *New York*, 176 U. S. 335, 346-347 [1900]; *United States* v. *170.88 Acres of Land*, 106 F. Supp. 623, 624 [E. D. Ky., 1952]; *United States* v. *Finn, supra.*) Under this doctrine positive constitutional assertion of limitations upon the power is required. This requirement is met by the provisions found in most of the state constitutions relating to the taking of property by eminent domain. Such constitu-

tional provisions neither directly nor impliedly confer the power of eminent domain, but are simply limitations upon a power already in existence which would otherwise be unlimited. (*Garrison* v. *New York,* 21 Wall. 196, 204 [1874]; *Kohl* v. *United States, supra; United States* v. *Jones, supra; Cincinnati* v. *Louisville, etc., R. R. Co.,* 223 U. S. 390, 404 [1912]; *United States* v. *Parcel of Land,* 100 F. Supp. 498, 504 [D. C. Col., 1951]; *United States* v. *277.97 Acres of Land.* 112 F. Supp. 159, 161 [S. D. Cal., 1953].) The only constitutional limitations which are imposed upon an exercise of the power of eminent domain by the sovereign itself are that the taking be for a public use, that just compensation be paid, and that due process be observed. (U. S. Const., Amdmt. XIV; N. Y. Const., Art. I, §§ 6, 7. See also, U. S. Const. Amdmt. V.)

Appellee contends that Indian tribal lands are not susceptible to an exercise of the State's power of eminent domain. However, unlike the situation which prevails with respect to Indian Reservations which were carved out of the Federal Public Domain, in which the Federal Government retains the underlying fee, or at least pre-emptive rights, the situation with respect to such lands in the State of New York is that Indian tribal lands are subject to the paramount rights of the State rather than the Federal Government. This is so because New York succeeded to the British sovereignty with no Federal sovereignty intervening. (*Jemison* v. *Bell Telephone Co.,* 186 N. Y. 493, 498, 79 N. E. 728 [1906]; *Seneca Nation* v. *Christie,* 126 N. Y. 122, 27 N. E. 275 [1891], err. dism. 162 U. S. 283 [1896].) More than a century ago the State's power to condemn Indian lands was recognized in New York. In *Wadsworth* v. *Buffalo Hydraulic Ass'n.,* 16 Barb. (N. Y.) 83 (Niagara Gen. Term, 1853), the Court said (p. 94):

> "Has the legislature the power to authorize the taking of the Indian lands for public use upon paying a just compensation, without their consent? I am not aware that this power has ever been seriously questioned. The people of the state, in their right of sovereignty are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the state. This is so declared in the statute. (1 R. S. 718.) The state possesses the power to appropriate to public use the lands of the Indians, notwithstanding the grant of the right of pre-emption to Massachusetts; and it has repeatedly exercised this right."

See, also, *O'Meara* v. *Commissioners of Allegany,* 3 Thomp. & C. 235, 236 (Gen. Term, 4th Dept., 1874), rev'd. on another ground 59 N. Y. 316; *France* v. *Erie Railway Co.,* 2 Hun 513, 5 Thomp. & C. 12 (Gen. Term, 4th Dept., 1874); *Dixon* v. *State of New York,* 4 Misc. 2d 76, 78 (Ct. Cl., 1956).

Appellee, however, insists that the Indian Intercourse Act (25 U. S. C. § 177) inhibits the State's exercise of its power of eminent domain as to Indian lands. Section 177 of the U. S. Code (formerly Rev. Stat. § 2116) is and was part of "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontier." (See historical note to U. S. C., § 171 [Rev. Stat. § 2111].) The Indian Intercourse Act of 1802 (2 Stat. 103) provides that title to Indian lands must be extinguished by a treaty made in the presence of a United States Commissioner. The provisions of that act, however, are not applicable to the thirteen original states which, it will be remembered, derived their title to Indian lands directly from the British Crown and not from the Federal Government (*United States* v. *Franklin County,* 50 F. Supp. 152, 155 [N. D., N. Y., 1943; basing this holding on the legislative history of the act]; and *cf. Seneca Nation* v. *Christie, supra; Jemi-*

*son* v. *Bell Telephone Co., supra*). Actually, a very large number of agreements were made without the presence of a United States Commissioner (see *Seneca Nation* v. *Christie, supra,* at p. 138).

The legislative history of the Indian Intercourse Acts indicates that, although the United States has sought to regulate the land transactions of the Indians by the so-called "non-intercourse" acts of 1790, 1793, 1799, 1802 and 1834 (now U. S. Code, § 177), an exception has been made with respect to the State. This was made clear in *United States* v. *Franklin County, supra,* wherein the Court said (pp. 155-156):

> "The right of the Indians in so-called 'tribal lands' was one of occupancy only; the fee of the lands remained in the sovereign which in the instant case was the State of New York. *Johnson* v. *McIntosh,* 8 Wheat. 543, 5 L. Ed. 681
>
> * * *
>
> The property rights of the Indians and the limitation imposed thereon have been the subject of many decisions, not all of which have tended to clarify the general subject. This is due in part to a failure to differentiate between the rights, obligations and limitations applicable when the right of pre-emption is in the United States and when it rests in the individual state.
>
> * * *
>
> The history of the Act of 1802 and preceding legislation is indicative of an intent to exempt a state 'having the right of pre-emption' from the provisions thereof. The first Indian Intercourse Act of 1790 invalidated by its language the sale of lands within the United States to any person or persons 'or to any state, whether having the right of pre-emption or not.' The clause quoted was omitted from the preceding Acts of 1796 and 1799. The omission is significant when viewed in the light of the practical construction given to the Act by both the State of New York and the United States."

In *St. Regis Tribe of Mohawk Indians* v. *State of New York*, 5 N. Y. 2d 24 (1958), it was held that the provisions of the Indian Intercourse Act do not apply to the State of New York. The Court said:

> "No authority has been cited to us which would indicate a contrary result."

Appellee also contends that 25 U. S. C. § 233, insofar as reference is therein made to alienation of Indian lands, renders its lands immune to the State's power of eminent domain. But the provision of § 233 upon which appellee relies is merely a reservation of the existing rights which the Indians have under § 177. It created no new rights. As the District Court put it in the case at bar:

> "If the Congress had intended to place an absolute restraint on the alienation of Indian lands in New York, or to assert an absolute paramount authority in the Congress over New York Indian lands, it would not have chosen so incongruous and unlikely a time and place to do so. If such a violent departure from the long history of dealing with and treating Indian lands had been intended, the Congress would surely not have done so in so casual and off-handed a manner. The parties have adduced nothing either by way of legislative history or legal interpretation, to indicate that such was the intent of Congress."

Insofar as the proper *constitutional* limitations on the State's power of eminent domain are concerned, there can be no doubt that the procedure set forth in the appropriation method of acquisition (New York Highway Law, § 30) meets with and satisfies the required standards.

*(1) As to due process*—Under section 30 of the Highway Law provision is made for service of a copy of the appropriation map and a notice of the appropriation upon

all owners (Subds. 9, 10, 11). Provision is also made with respect to owners and other persons who are in actual physical occupation of the premises leading toward their removal from such lands. Such provisions require the service of a preliminary notice to quit and subsequent legal proceedings to dispossess such occupants (Subd. 12). There are, under the circumstances, available to the condemnee several avenues of legal relief which he may pursue in the *courts* of the State of New York or in the Federal *courts*. The validity of the taking may be tested in the State courts in a proceeding under Article 78 of the New York Civil Practice Act to review the determination of the Superintendent of Public Works (made under Highway Law, § 30[3]). The validity of the taking may likewise be tested in the dispossess proceeding mentioned above. Either in the State courts or the Federal courts the condemnee may attack the validity of the taking, as has been done in the case at bar. Obviously, there is ample notice and ample opportunity to resort to the courts in the protection of one's property rights. Thus, due process is fully and completely subserved.

*(2) As to compensation*—Full provision is made under Highway Law § 30 for the voluntary adjustment of the compensation by agreement of the parties (Subd. 13) or for the filing of a claim in the State Court of Claims and the eventual rendering of an award by the Court (Subd. 14).

*(3) As to public use*—The acquisition of title by the State for a federal purpose has been the subject of judicial approval on many occasions. For many years after the federal constitution was adopted and while the fear of a too centralized government was still prevalent and the extent of the powers of the United States under the constitution was yet but dimly understood, whenever the

acquisition of land within the limits of a state for the use of the federal government became necessary, it was the practice for the taking to be made in a state court and by the authority of a state statute. This practice continued for many years without objection and, when questioned, was sustained on the ground that the public work for which the taking was made, although to be controlled and managed by the United States, was for the use and benefit of the people of the State in that they shared in the benefit. (*United States* v. *Jones,* 109 U. S. 513 [1883]; *Wayne County Court* v. *Louisa & Fort Gay Bridge Co.,* 46 F. Supp. 1 [D. C., S. D., West Virginia, 1942], *Gilmer* v. *Lime Point,* 18 Cal. 229 [1861]; *Burt* v. *Merchants' Ins. Co.,* 106 Mass. 356, 8 Am. Rep. 339 [1871]; *Orr* v. *Quimby,* 54 N. H. 590 [1874]; *Delfeld* v. *Tulsa,* 191 Okl. 541, 131 P. 2d 754, 143 A. L. R. 1032 [1942]; *United States* v. *Dumplin Island,* 1 Barb. [N. Y.] 24 [1847]; *Lancey* v. *King County,* 15 Wash. 9, 45 P. 645, 34 L. R. A. 817 [1896]; *State ex rel. Thomas Furnace Co.* v. *Milwaukee,* 156 Wis. 549, 146 N. W. 775 [1914].)

The second premise upon which the validity of the State's taking is based is that the method pursued by it in effecting the acquisition is in no way repugnant to, but actually in furtherance of, federal statutes. In the first place, as pointed out above, the State may, in the exercise of its sovereign power, act in any manner which it desires provided only that the constitutional limitations above set forth are observed. In the second place, assuming *arguendo* that its action on behalf of the New York Power Authority should be had pursuant to the federal statutory power granted to the latter, it is submitted that compliance has been effected.

As a licensee of the Federal Power Commission, the Power Authority has been expressly authorized to acquire

property under section 21 of the Federal Power Act (16 U. S. C. § 814). This section does not, however, set forth the procedure whereby lands may be acquired. For this we must refer to the State law (Public Authorities Law, Art. V, Tit. 1, § 1007), under which the Power Authority is authorized to acquire lands by condemnation under the provisions therein set forth, by condemnation under the general condemnation law of the State, or by appropriation according to the procedure provided by Highway Law, § 30. Authority is ample for the proposition that the Federal statutes and the State statutes should be read together to spell out complete authority as to power, forum and procedure. (*Oakland Club* v. *South Carolina Public Service Authority*, 30 F. Supp. 334, 341 [D. C., E. D. South Carolina, 1939], aff'd. 110 F. 2d 84, 86 [C. C. A., 4th Cir., 1940]; *Burnett* v. *Central Nebraska Public Power & Irr. Dist.*, 147 Neb. 458, 23 N. W. 2d 661 [1946].)

The Court of Appeals in the case at bar held that the procedure for acquisition, followed herein, was not in the manner directed by 16 U. S. C. § 814 in that the latter required proceedings in the state or federal courts. But the procedure followed by the State was one brought in the State courts. With respect to the validity of the taking, the condemnee was at liberty, as set forth above, to review the question in the State Supreme Court under Article 78 of the New York Civil Practice Act. It could contest the validity of the taking in a dispossess proceeding brought in the State court. It could do the same in a plenary proceeding of the character of the instant case either in the State or the Federal courts.

Insofar as the determination of the compensation is concerned, provision is made (Highway Law, § 30[14]) for resort to the Court of Claims which is a constitutional court

of record of the State of New York (N. Y. Const., Art. 6, § 23).

The Court of Appeals held that the procedure employed herein to effect the acquisition "enables the Power Authority to move in, appropriate the land and remove the owner before he has had a chance to have a judicial hearing." But the instant proceeding, if nothing else, completely disproves such contention.

**The Questions Are Substantial**

The legal issues involve the sovereign power of eminent domain of the State of New York as to Indian lands, as it has been exercised for more than a century and a half. The decision of the Court of Appeals for the Second Circuit impugns the validity of hundreds of past and contemporary takings of Indian lands and throws thousands of titles in the State of New York into chaos and confusion.

With respect to the applicability of the Indian Intercourse Act to the State of New York, we are now faced with a clear conflict of opinion between the Federal Court of Appeals, as expressed in this case, and the New York Court of Appeals, as expressed in the *St. Regis* case, *supra*. Aside from the substantive point, considered above, respecting the non-applicability of the Indian Intercourse Act to the State of New York, it becomes important to determine whether, assuming its applicability, the Federal Government may thereby impair the State's sovereignty. (See *In re Cameron County Water Improvement Dist. No. 1*, 9 F. Supp. 103, 106 [D. C., S. D. Texas, 1934], rev'd. on other gds. 81 F. 2d 905 [C. C. A., 5th Cir., 1936], rev'd. on other gds. 298 U. S. 513 [1936].)

The legality of the appropriation method is of inestimable importance because it must be noted that the criticism of

the Court of Appeals in this regard applies to all lands thereby acquired, not merely to Indian lands. Numerous acquisitions have been made by the State by this method in connection with the St. Lawrence Seaway. If the decision of the lower Court is permitted to stand, utter confusion will ensue as to the titles acquired and as to the right of claimants to compensation for such takings.

It is submitted that the decision of the Court of Appeals failed to recognize the character of the condemnor as a sovereign, ignored the historical development of the Indian Intercouse Act, and did not properly analyze the New York appropriation method of exercising its power of eminent domain so that it could be clearly seen that ample opportunity is afforded to a condemnee to test the validity of a taking before he is deprived of his property.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

September 5, 1958.

Respectfully submitted,

Louis J. Lefkowitz,
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## APPENDIX A

### Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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No. 394—October Term, 1957.

(Argued July 10, 1958 Decided July 24, 1958.)

Docket No. 25236

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TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,
*Plaintiff-Appellant,*

*v.*

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES,
*Defendants-Appellees-Cross Appellants,*

and

SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON,
*Defendant-Appellee.*

---

Before:

SWAN and MOORE, *Circuit Judges,* and ANDERSON, *District Judge.*

---

Appeal from the United States District Court for the Western District of New York; Justin C. Morgan, *Judge.*

*Appendix A.*

Tuscarora Nation of Indians, also known as Tuscarora Indian Nation, appeals from a judgment dismissing the complaint in an action against Power Authority of the State of New York, Robert Moses, and Superintendent of Public Works of the State of New York, John W. Johnson which sought: (1) a declaratory judgment declaring its rights and status; (2) a preliminary injunction against the appropriation of plaintiff's land within the Tuscarora Reservation; (3) a temporary restraining order; (4) a permanent injunction; and (5) a judgment vacating and annulling all descriptions, maps, notices and other instruments purporting to appropriate plaintiff's property.

Power Authority of the State of New York appeals from that part of said judgment which orders that the affidavit of Henry S. Manley be stricken and only be considered as an additional brief.

Modified. Appeal by Power Authority affirmed.

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ARTHUR LAZARUS, JR., Esq., Washington, D. C. (Strasser, Spiegelberg, Fried & Frank, New York, N. Y., on the brief) *for Plaintiff-Appellant.*

THOMAS F. MOORE, JR., Esq., New York, N. Y. (Samuel I. Rosenman, Henry S. Manley, John R. Davison, New York, N. Y., on the brief) *for Defendants-Appellees-Cross Appellants, Power Authority of the State of New York and Robert Moses.*

JULIUS L. SACKMAN, Associate Attorney, Albany, N. Y. (Louis J. Lefkowitz, Attorney General of the State of of New York, Paxton Blair, Solicitor General, Albany, N. Y., on the brief) *for Defendant-Appellee, Superintendent of Public Works of the State of New York, John W. Johnson.*

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*Appendix A.*

MOORE, *Circuit Judge:*

The appellant Tuscarora Nation of Indians (referred to as "Tuscarora") brought this action in the federal court under 28 U. S. C. A. 1331, 2201 and 2202; (1) for a declaratory judgment to the effect that the appellees, Power Authority of the State of New York, Robert Moses, and Superintendent of Public Works of the State of New York, John W. Johnson, have no power to acquire a portion of their lands without the express consent of the United States and (2) for a permanent injunction against the appropriation of their lands without their consent.

The suit was commenced on April 19, 1958 in the Southern District of New York, and was later transferred (161 F. Supp. 702) to the Western District, where it was heard on the merits. The decision of June 24 (not yet reported) ordered (1) that the Power Authority's motion for a three judge court be denied; (2) that the temporary restraining order previously issued be dissolved; (3) that plaintiff's motion for a permanent injunction be denied; (4) that the complaint be dismissed without costs; and (5) that the affidavit of Henry S. Manley be stricken as an affidavit and be considered as an additional brief on behalf of the defendants. The appeal is taken pursuant to 28 U. S. C. A. 1291.

The Tuscarora are a tribe of American Indians occupying lands in western New York. They migrated to central New York State from North Carolina prior to the American Revolution and became a part of the Iroquois Confederacy, sometimes referred to as the Six Nations. Subsequent to the Revolution New York State desired to move the Oneidas and Tuscaroras from central New York to the territory of

the Senecas in western New York. As a result of sales of the Indians' rights of occupation the main body of Tuscaroras moved to Niagara County where they acquired three tracts of property. The first tract, a mile square (640 acres), was a right of occupancy conceded to them by the Senecas. The second tract (1280) acres was a gift from the Senecas and the Holland Land Company. The third and largest tract, and the only tract involved in this litigation, consists of 4329 acres. This third tract was acquired in 1804 (title finally taken in 1809) for the Tuscarora through the good offices of the Secretary of War of the United States. The Tuscarora purchased the fee to this tract from the Holland Land Company out of the proceeds received from the sale of their North Carolina properties. Since that time the Tuscaroras have lived on these tracts as a tax-exempt Indian Reservation despite the fact that the third tract was acquired by purchase and not as a grant from the United States.

The Power Authority of the State of New York is in charge of the development of a power project in western New York known as the Niagara River Power Project. This project was authorized by Congress and made possible by a treaty with Canada (February 27, 1950), which greatly enlarged the amount of water from the Niagara River available to the United States for power purposes. Following the treaty Congress through Public Law 85-159 (Act of August 21, 1957, 71 Stat. 401) authorized and directed the Federal Power Commission to issue a license to the Power Authority for the construction and operation of a power project with capacity to utilize all of the United States' share of the water permitted to be diverted under the terms of the treaty. The license was issued on January 30, 1958.

*Appendix A.*

On March 28, 1958 the Power Authority filed a petition in the Supreme Court of the State of New York for Niagara County to condemn 1,383 acres of the Reservation lands of the Tuscarora Nation of Indians whose entire Reservation consisted of 6,249 acres. The portion sought to be condemned was planned to be used for a water storage reservoir in connection with the Niagara power project. On April 15, 1958 the Power Authority withdrew the condemnation proceedings in the Supreme Court of New York and by filing a map of the 1,383 acre portion of the Tuscarora Reservation pursuant to § 30 of the New York State Highway Law and Article 5, Title 1 of the Public Authorities Law, appropriated the 1,383 acres for the purpose of the reservoir. At the same time a sum estimated by the Power Authority to be the fair market value of the appropriated land was, as required by Statute, deposited with the Comptroller of the State of New York. The provisions of § 30 of the New York Highway Law authorize the Power Authority, after filing the map and depositing the money, immediately to enter upon and take possession of the property described.

A power plant has been planned which will be the largest hydro-electric project in the United States. The total cost is estimated at upwards of $625,000,000 and contracts have already been authorized for more than $339,000,000. An essential part of the project is a large water storage reservoir of at least 600,000 acre feet. Construction work and power lines relocation are now at the very edge of the Tuscarora Reservation.

Although both parties have given the court the benefit of the historical development of title to Indian lands in New York State and the various treaties relating thereto, this

background material affects largely tracts 1 and 2 which are not now before the court. Since tract 3 was acquired in fee by purchase the primary question is: What laws and treaties apply to, and what other obligations have been assumed by the United States and the State of New York with respect to, this particular Indian Reservation?

Appellant claims that the taking of a portion of its Reservation is in violation of Title 25, United States Code, Sections 177 and 233. Appellees, on the other hand, assert that these statutes do not apply to the State of New York which possesses sovereign power of condemnation over Indian lands, independent of and never surrendered to, the Federal Government, derived from its status as one of the original thirteen colonies.

*Indian Non-Intercourse Acts: State and Federal*

In order to prevent Indians from being victimized by artful scoundrels inclined to make a sharp bargain, both New York and the United States from an early date imposed restrictions on the acquisition of lands from the Indians by private persons unless adequate protection was afforded. Thus in 1777 the first Constitution of New York State provided that "no purchases shall be binding or deemed valid unless made under the authority and with the consent of the legislature of this State" (Article XXXVII). This provision, in substance, has been continued in subsequent constitutions.

In 1790 the United States enacted its first Indian Non-Intercourse Act which imposed a similar restriction against sale "unless the same shall be made and duly executed at some public treaty, held under the authority of the United

States" (1 Stat. 138). A second Non-Intercourse Act was passed in 1793. Other acts embodying substantially the same restrictions were enacted but the statute remains in virtually the same form today. Thus 25 U. S. C. A. § 177 provides:

> "*Purchases or grants of lands from Indians.* No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty."

*Subsequent Laws and Decisions*

As time passed the states were given more and more power to apply their laws in the Reservations of the Indians. Appellees refer to many cases, spread over a century and a half or more of dealings between the State of New York and the Indians within its boundaries, relative to Indian Reservations or tribal lands, reveal transfers in which parcels of land or interests therein, such as highways, easements for telephone lines and other takings short of the seizure of the whole or a substantial portion

of such Reservations or tribal land, have been taken, granted or conveyed without special authorization by Congress and with the express, or at least tacit, acquiescence of the executive official of the United States chargeable with the responsibility for Indian affairs. A great majority of these cases have been in the State Courts of New York and two or three have been in the District Court of the United States. An examination of these cases discloses that between the earliest years of this Nation's existence and 1950, a large measure of social and economic intercourse relating to Indian tribal matters in the State of New York has been left to the State of New York through either the indifference or approval or express authorization of the federal executive officials who at a particular time had the responsibility for the care of the Indians. Despite this situation the Court of Appeals of New York has recognized that during all of this period, the Indians are and always have been, since the formation of this Government, the wards of the Nation and not of the States, and that the Federal Government has never relinquished its suzerainty over them.

In both criminal and civil fields Congress allowed the State laws to be extended onto the Reservations. However, in the act of September 13, 1950, 25 U. S. C. A. § 233, granting to the courts of New York State jurisdiction in civil actions between Indians, there were specific exceptions, the first being that nothing therein contained shall be construed as subjecting the lands within Indian Reservations in the State of New York to taxation or subjecting them to execution on any judgment except a judgment by one tribal member against another as to use or possession of land; and second, "That nothing herein contained shall

be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Reservation in the State of New York; * * *." This second exception was made the subject of comment in the Report of the Joint Legislative Committee on Indian Affairs to the Legislature of the State of New York as follows:

> "Neither would the proposed law permit taxation of alienation of reservation land, although many Indians have been led to believe that these are the very ends the bills aim to accomplish.
>
> "Specific exclusion of the powers of taxation and disturbance of titles makes it clear that adoption of the bills would not end all Federal guardianship * * *."

*The Power Authority's License*

The Power Authority claims to have derived its authority from a license issued to it pursuant to Public Law 85-159, 71 Stat. 401 which authorized and directed the Federal Power Commission to issue a license to the Power Authority for the construction and operation of a power project to utilize all of the United States' share of the water of the Niagara River permitted to be used by International agreement. Such a license was issued to the Power Authority although vigorously opposed by the Tuscarora. The Commission, however, did not pass on the eminent domain question because it expressly declared "The question of whether the Licensee is empowered to acquire Intervener's land in eminent domain proceedings is, in our view, a question to be resolved by a court of competent jurisdiction. In any event, we are of the view that we are not required to render an advisory opinion on that question." A petition for review of the Commission's order is presently pending before the Court of Appeals for the District of Columbia.

*Appendix A.*

Under § 4(e) of the Federal Power Act, 16 U. S. C. A. § 797, the Commission is authorized to issue licenses for the purpose of constructing reservoirs and power houses, etc., even "upon any part of the public lands and reservations of the United States" except that such a license "shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the Department of Interior under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization for such reservations; * * *."

The acquisition of property for the construction of reservoirs, etc., is implemented by § 814 of the Federal Power Act which provides for the exercise by the licensee of the right of eminent domain. The section specifically provides for the manner in which this power may be exercised, namely, "It may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the state courts. * * *"

*The United States Guardianship of Indian Rights*

Over the last one hundred and fifty years there have been many court decisions relating to the rights of Indians. Although each case was decided on the facts which gave rise to the controversy, there has been uniform support for the doctrine that the Indian tribes are wards of the United States and that a general guardianship power is vested in the United States to protect them and their

property. This philosophy on the part of the courts has been expressed in various ways.

In the New York Court of Appeals, *People Ex Rel. Cusick* v. *Daly,* 212 N. Y. 183 (1914), the court, after referring to the Supreme Court's decision in the *Kagama* case (*United States* v. *Kagama,* 118 U. S. 375 [1886]), which stressed the fact that the Reservation had been set apart by the United States said: "But these were not the controlling elements in the decision, as will be seen from a perusal of the whole opinion, for the power of the Federal authorities was asserted primarily because the Indian tribes in this country were, and always had been since the formation of the government, the wards of the nation and not of the states." This case dealt specifically with the Tuscarora Indians. The court traced their history from their North Carolina days to their final Reservation in Niagara County, saying: "Interesting as these facts may be to the student of history, they have little bearing upon the question to be decided. The truth is that we are dealing with dual relations growing out of peculiar conditions. The state of New York has enacted laws conferring upon these Indian tribes certain powers to regulate their own affairs, and to protect their lands from invasion (see Indian Law, Cons. Laws, Ch. 26), but the Federal government has never relinquished its suzerainty over them." The court further held that there was "no less reason for placing them [the New York Indians] under the protectorate of the Federal government than there was for extending it to the other tribes resident in any of the original thirteen colonies" (p. 192). The court continued "Congress has continued to act upon the theory that it has jurisdic-

tion of our New York Indian tribes no less than of their brethren in the west" (p. 193). The conclusion of the court was that "From this confusing history of Federal and state legislation and judicial decisions upon matters affecting the relations of our governments to the Indians, it will be seen that the question is not free from doubt, but there are a few considerations which incline us to the view that the Federal jurisdiction must prevail" (p. 196).

The *Cusick* case was followed by *Mulkins* v. *Snow*, 232 N. Y. 47, in which the court said "They [the Indians] are the wards of the nation and Congress has full authority to legislate for them within their reservation. (*People ex rel. Cusick* v. *Daly*, 212 N. Y. 183). When the state of New York legislates in relation to their affairs, its action is subject to the paramount authority of the federal government" (p. 51).

In the Supreme Court of the United States this guardianship has been frequently restated. It was described in the *Kagama* case, *supra*, as follows:

> "* * * These Indian Tribes *are* the wards of the Nation. They are communities *dependent* on the United States; dependent largely for their daily food; dependent for their political rights. * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen."

In *United States* v. *Candelaria*, 271 U. S. 432, 439, the court said:

> " 'Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, *whether within its original territory* or territory subsequently acquired, and whether within or without the limits of State * * *' It is for that body [Congress] and not for the courts, to determine when the true interests of the Indian require his release from such condition of tutelage.' "

Not only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York but it has, by the enactment of the express reservation concerning land interests of the Indian tribes in New York in Title 25 U. S. C. A. § 233, pointed up and reaffirmed its paramount authority over Indian tribal lands.

The primary question now to be decided is whether sections 177 and 233 of Title 25 U. S. C. A. prohibit the taking of any portion of the lands of the Tuscarora or whether the general power of the sovereign, namely, the United States, to take the lands of any of its subjects for appropriate public purposes, provided just compensation is paid, is paramount and impliedly written into all statutes affecting property.

A secondary question is, assuming that power of eminent domain exists, has it been exercised by the proper authority and in the manner prescribed by law?

Where the lands in question owned by citizens other than Indians, there would be no question but that the power of

eminent domain could be exercised for the purposes of the power project. To create an exception it must be found that the Indians occupy some special status which renders them immune from the application of this principle. For many years their Reservations have been specially protected by law. They have practiced their own tribal customs and enjoyed their own way of life without too much outside interference. The present appropriation calls for the destruction of approximately one-third of the entire Reservation embraced within tract number 3. Unless there is some over-riding need or equity in others, the situation would seem to call for the exercise of that guardianship protection which the United States has asserted and exerted over the years.

On the other hand, as years go by there has been concious effort to assimilate the Indians into the communities in which they live and to extend to them the same equal protection of the laws as all other citizens enjoy. This view is well exemplified in the Senate Report which preceded the passage of the civil jurisdiction bill in 1950 in which it was said that:

> "Your committee believes that all citizens of a State should be parts of one social order; that anything which conflicts with this principle should be brought into conformity therewith at the earliest time consistent with justice; that the civil relationship and responsibility of all citizens within a State should be equal as well as just and under the jurisdiction of a common code of laws that govern all and protect all alike." (Sen. Rep. No. 1836, June 15, 1950.)

If the Indians are to enjoy equal protection of the laws and all the other benefits extended to each citizen it may well be that they should bear some of the burdens including that

of being subjected to having their lands condemned for public purposes, beneficial to the State in which they live.

The sovereign power of the United States is exercised by Congress and it would be anomalous indeed if this very power which could make its own land subject to condemnation (16 U. S. C. A. section 797) could not be extended to the land of those over whom it exercises its guardianship. This power has been asserted from time to time as, for example, in the Reclamation Acts, the appropriation of vast areas in the mid-west for irrigation and other public projects. In *Henkel* v. *United States*, 237 U. S. 43, 49, 50, the Supreme Court said:

> "The authority of the Congress of the United States to devote these lands to irrigation purposes is unquestioned. As a matter of fact, it might, if it saw fit, remove the Indians therefrom and devote the land to such uses. Recognizing the injustice of arbitrary appropriations to other uses, no effort has been made to take these lands without compensation to the Indians for the improvements which they have made, and they have been given the right to select other lands in place of those released. The reclamation projects undertaken by the Government are very extensive, and cover many States; and they must involve in their construction, the flooding of lands in connection with dams designed to hold water for such purposes; and must necessarily include much territory which is included in Indian reservations. This situation was of course well known to Congress when it passed the Reclamation Act, and we cannot doubt, in view of the broad authority conferred by §§ VII and X above quoted, that it was the purpose of Congress to give the Secretary of the Interior the right to acquire such rights as are here involved, when necessary for reclamation purposes. In carrying out the purposes of the act, the Secretary of the Interior is authorized to acquire any rights or property necessary for that

purpose, and to acquire the same, either by purchase or by condemnation. He is specifically authorized to perform any and all acts necessary and proper for the purpose of carrying into effect the provisions of the act. Authority could hardly have been conferred in more comprehensive terms, and we do not believe it was the intention of Congress, because of the Indians' right of selection of lands under the circumstances here shown, to reserve such lands from the operation of the act. To do so might defeat the reclamation projects which it was evidently the purpose of Congress to authorize and promote. * * *"

The power of condemnation was also recognized in the passage of section 409(a) Title 25 U. S. C. A. which provides that "Whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation of other proceedings for such public purposes, * * *" the proceeds therefrom may with the approval of the Secretary of the Interior be reinvested in other lands selected by the Indians and shall become restricted as to alienation and taxability as the lands condemned.

The court below came to the conclusion that "There is no constitutional requirement that the appropriation now involved be specifically authorized by an act of Congress" and that neither sections 177 or 233 of Title 25 U. S. C. A. presented any bar to the exercise of eminent domain. The wording of these two statutes does not, in our opinion, lead to such a conclusion. However, the same result is reached because the right of eminent domain of the United States is superior to, and could not have been extinguished

by, the statutes in question. Of necessity, however, the exercise of this power must be by the United States through Congress.

This power may be found in the direction given to the Federal Power Commission to issue a license to the Power Authority (71 Stat. 401) and the right granted to a licensee to use the right of eminent domain. Appellant challenges this approach by arguing (1) that the Federal Power Commission cannot thus usurp the authority of Congress and (2) that any taking of Tuscarora property must be by special enactment directed to Tuscarora land. General acts, the Tuscarora say, will not suffice.

There is no question that Congress has the constitutional authority to take Indian Reservation or tribal lands by eminent domain. *Cherokee National* v. *Southern Kansas Ry. Co.*, 135 U. S. 641. There remain to be determined whether in delegating its power of condemnation to the Power Authority, Congress expressly or impliedly intended to authorize the taking of Indian Reservation or tribal lands (as distinct from lands allotted to Indians in severalty, 25 U. S. C. A. 357); and whether in the course of its condemnation procedure the Power Authority complied with the pertinent provisions of the Federal Power Act.

Congress did not expressly authorize the taking of the appellant's land for the Niagara Power Project. Can it be inferred from the nature of the project and its proximity to the Reservation or from the impracticability of constructing it without taking a portion of the Tuscarora Reservation that Congress intended to authorize such a taking? *Western Union Telegraph Co.* v. *Pennsylvania*

*Railroad Co. et al.*, 195 U. S. 540; *Spaulding* v. *Chandler*, 160 U. S. 394 (1895); *Seneca Nation of Indians* v. *Brucker*, U. S. District Court, District of Columbia, Civil No. 2202-57, dated March 24, 1958 (unreported), and cases cited therein. Such an inference may properly be drawn when consideration is given to the size and extent of the Niagara Power Project.

The electric plant will have a capacity of 2,190,000 kilowatts, the largest hydroelectric plant in the United States, and will produce annually some 13,000,000,000 kilowatt hours of energy. To accomplish this result a large storage reservoir is essential for the efficient use of the available water supply.

The legislative history of the Niagara River Hydroelectric Power Project, 85th Congress, First Session, 1957, Vol. 2, U. S. Congressional and Administrative News, pages 585, *et seq.*, shows that in the hearing before both Houses of Congress, the redevelopment plan contemplated "a pump-storage plant at the top of the Niagara escarpment 0.8 mile east of Lewiston, where water would be pumped during the night hours to a reservoir with surface area of 850 acres * * *." While this acreage is less than that now sought to be taken, it may be assumed that Congress had general knowledge of the terrain and the pertinent area and that appellant's Reservation was in the vicinity and likely to be taken in part for the purposes of the project.

The direction to the Federal Power Commission was specific, namely, "to issue a license to the Power Authority of the State of New York for the construction and opera-

tion of a power project with capacity to utilize all of the United States share of the water of the Niagara Power permitted to be used by International agreement." The licensee by virtue of section 814 becomes vested with the governmental power of eminent domain. The exercise of the right is thus the act of an agency of the sovereign. But just as the grant is given by Congress it should be exercised in the manner prescribed by Congress which is either in the district court where the property is located or in the state courts. The appellees, although they started their condemnation proceedings in the State court, chose to abandon that method and proceeded under New York Public Authorities Law (specifically passed in 1958) and the New York Condemnation Law giving the Power Authority the right to proceed by appropriation under section 30 of the New York Highway Law. If Congress had intended this procedure to be followed, section 814 instead of providing "in the state courts" would have to read "or in such manner as may be prescribed by the legislature of the state in which the property is located." The specific 1958 legislation dealing with the Niagara River project enables the Power Authority to move in, appropriate the land and remove the owner before he has had a chance to have a judicial hearing. If Congress wishes this to be the method of eviction it should at least so declare in specific terms.

The final question is, what relief should be granted? The construction workers are on the borders of the Reservation ready to install power lines and cover the land with fill for the reservoir dikes. Nevertheless, aggressive construction activity should not be sufficient to nullify the

protective policy of the Government towards the Indians or the laws calculated to enforce that policy. The Congressional concern, exhibited as recently as 1950, to except the two elements most carefully guarded by the Government, namely, tax exemption and alienation, from transfer to the civil jurisdictional powers of the State of New York is ample evidence that "guardianship" still exists. If the Indians are no longer to be the wards of the United States such a change should be by Congressional enactment and not by court decision.

The court below dismissed the complaint thus preventing any relief by way of declaration of rights. This portion of the judgment should be reversed. Since the complaint seeks a declaration of rights we hold that the Power Authority of the State of New York as a licensee of the Federal Power Commission directed to issue a license pursuant to Public Law 85-159 (Act of August 21, 1957, 71 Stat. 401) is authorized to exercise the right of eminent domain according to the procedures specified in section 814 of the Federal Power Act (16 U. S. C. A. section 814).

Pending the final determination of this action or any proceeding seeking to acquire the property in question, appellees are stayed from entering upon or damaging lands within the Tuscarora Reservation except that appellees shall have the right to conduct, and continue with, such activities on said property as have been excluded from the stays heretofore entered as amended from time to time.

The proceedings taken to appropriate the property in question by the filing of maps, notices or other documents pursuant to the Highway Law and the Public Authorities Law of the State of New York are vacated and annulled.

*Appendix A.*

The District Court, in the event that the Power Authority desires to exercise its right of eminent domain in that court, is requested to expedite all proceedings as much as possible.

Insofar as the judgment appealed from dismisses the complaint and denies a stay it is reversed.

Insofar as the decision below holds that the Power Authority has the right to exercise eminent domain it is affirmed.

The cross-appeal with reference to the affidavit of Henry S. Manley is affirmed. It is sufficient that the material therein contained be received within the limitations fixed by the court below.

The judgment should be modified in accordance with this opinion. No costs.

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SWAN, *Circuit Judge* (dissenting):

I disagree with the majority opinion only in its holding that condemnation by appropriation pursuant to the state statutes is not permissible under § 21 of the Federal Power Act and the license issued by the Commission. In my opinion the judgment should be affirmed. The reasons which have led me to this conclusion have not been persuasive to my brothers, and I refrain from stating them here in order to avoid delaying the decision of the court.

## APPENDIX B

### Opinion of the United States District Court For the Western District of New York

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

*Plaintiff,*

*vs.*

POWER AUTHORITY OF THE STATE OF NEW YORK, ROBERT MOSES, and SUPERINTENDENT OF PUBLIC WORKS OF THE STATE OF NEW YORK, JOHN W. JOHNSON,

*Defendants.*

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Civil Action No. 7844.

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Strasser, Spiegelberg, Fried & Frank (Arthur Lazarus, Jr., Esq., of counsel), New York, New York, Attorneys for Plaintiff.

Thomas F. Moore, Jr., Esq., New York, New York, Attorney for Defendants Power Authority of the State of New York and Robert Moses.

Louis J. Lefkowitz, Attorney General of the State of New York, (Julius L. Sackman, Esq., of counsel), Albany, New York, Attorney for Defendant John W. Johnson.

The complaint in this action was filed in the Southern District of New York on April 19, 1958. The action is one for declaratory judgment, wherein the plaintiff prays

*Appendix B.*

(1) That it have a judgment and decree of this court defining its rights and status therein, particularly adjudicating that neither of the defendants, nor any of them, had any right, authority or power to acquire, or attempt to acquire, by appropriation or otherwise, any or all of the lands belonging to plaintiff within the Tuscarora Reservation;

(2) That a temporary restraining order be granted restraining and enjoining the defendants and each of them and their agents, servants, employees and attorneys, and all persons in active concert and participation with them, from entering upon, or taking any action with regard to any appropriation of land belonging to the plaintiff within the Tuscarora Reservation;

(3) That a permanent injunction permanently granting the relief sought by the temporary restraining order be granted;

(4) That this court set aside, vacate and annul all descriptions, maps, notices and other instruments in connection with the purported appropriation.

The complaint alleges that plaintiff is a recognized tribe of American Indians residing on the Tuscarora Reservation in Niagara County, New York. The complaint further alleges the existence of an actual controversy "which is definite, concrete, real and substantial, which involves and affects the legal relations of plaintiff and defendants, and vitally affects the public interest." This action is brought under Sections 2201 and 2202, Title 28 U. S. C. and the complaint alleges jurisdiction by reason of Title 28 U. S. C., Section 1331. The plaintiff claims relief under Article I,

*Appendix B.*

Section 8, of the Federal Constitution, authorizing Congress to regulate commerce with the Indian tribes, and Treaties of October 22, 1784,*[1] 7 Stat. 15, and November 11, 1794,[2] 7 Stat. 44, entered into by the United States and the Six Nations of Indians, including plaintiff, and R. S. Section 2116, 25 U. S. C. 177, and the Act of September 13, 1950, 25 U. S. C. 233, relating to the alienation of Indian lands.

The defendant Power Authority of the State of New York is a corporate instrumentality and a subdivision of the State of New York. The defendant Robert Moses is the Chairman of the Power Authority of the State of New York and the defendant John W. Johnson is the duly appointed and acting Superintendent of Public Works of the State of New York.

It further appears that Averell Harriman, Governor of the State of New York, on April 11, 1958 signed into law Chapter 646 of the Laws of 1958, amending paragraph 1 of Section 1007(10) of the Public Authorities Law, as follows:

> "The Authority may determine what real property is reasonably necessary for the improvement and development of the Niagara River or the International Rapids section of the St. Lawrence River. If funds are made available by the Authority to the State for payment of the cost and expense of the acquisition thereof, the Superintendent of Public Works, when requested by the Authority, shall acquire such real property in the name of the State by appropriation and, where necessary, remove the owner or occupant thereof and obtain possession, according to the procedure provided by Sec. 30 of the Highway Law, inso-

* References will be found in the Appendix to this opinion.

far as the same may be applicable. The Authority shall have the right to possess and use for its corporate purposes, so long as its corporate existence shall continue, all such real property and rights in real property so acquired."

Acting under the amendment provided by Chapter 646 of the Laws of 1958 of the State of New York as above indicated, the Power Authority of the State of New York obtained, after a long and at times bitter contest before the Congress of the United States, *the status of a licensee of the Federal Power Commission*, an agency of the United States Congress, to which the latter had delegated its authority concerning water power and hydroelectric development. While this debate in the Congress of the United States was proceeding as to what agency, if any, would be the representative of the United States following its treaty with the Dominion of Canada in 1950, the Dominion of Canada proceeded immediately, and has created, and is now utilizing, a very modern and most valuable hydroelectric power system, the turbines of which generate power and have for some years past; parenthetically, following the destruction of the Niagara Mohawk plant (formerly the Niagara Power Company) on the American shore of the Niagara River, negotiations were entered into resulting in sale by the Dominion of Canada to the United States of power from this very new equipment. Thus, in the final legislation by the Congress, empowering the Power Authority of New York to proceed as a licensee of the Federal Power Commission; and in the State of New York legislation of 1958, germane to the issue of power; time was shown to be most important.

The plaintiff claims that the Power Authority, in its attempt to occupy lands of the plaintiff, is offending fed-

eral treaties and statutes and that the defendants have not requested, nor has the Congress of the United States granted, permission to acquire lands belonging to plaintiff. The plaintiff further alleges that the 1300 acres of land within the Tuscarora Reservation which defendants have purported to appropriate is of a unique character to plaintiff; in that it has been occupied by the Tuscarora Nation for over 150 years; and is land upon which they hope and intend to live in the future. Plaintiff further alleges that in the event that an area of the Reservation is taken, it cannot acquire by purchase similar contiguous land by using the proceeds from the lands taken "since any newly acquired lands would not be part of plaintiff's community and would be alien to plaintiff's customs, traditions and history."

This is a novel argument in view of the fact that the 1300 acres was purchased by the antecedents of those constituting the Tribe of Tuscarora Indians with moneys obtained from the sale of lands originally owned by this Tribe in North Carolina. The plaintiff further contends that the unique character of the land on the reservation is in sharp contrast to all alternative land available to the defendants outside the reservation. This is of no avail, as many cases have determined this to be a legislative and not a judicial question.

A great deal of historical and legal material respecting Indian lands generally, and the land of this plaintiff in particular, has been submitted by the parties. The reservation of this plaintiff appears to be unique among Indian lands in New York. The records indicate that a few Tuscaroras settled at or near the present reservation as early

as 1780,[2a] but the tribe does not appear to have acquired legal title to the present reservation lands until some 20 to 30 years later, between 1800 and 1810. In addition, none of plaintiff's land was ceded or allotted to it either by the United States or the State of New York. The land was acquired in three parcels, to wit: one parcel acquired by deed from the Seneca Nation;[3] a second parcel acquired by grant from the Holland Land Co.; and the third parcel acquired by purchase from the Holland Land Co.[4] It is from this third parcel of 4329 acres that defendant Power Authority wishes to take approximately 1300 acres of land to construct a reservoir. There is no dispute among the parties concerning the way in which plaintiff acquired the disputed tract.

Plaintiff claims the protection of the Treaties of Fort Stanwix, signed October 22, 1784, and the Pickering Treaty, signed November 11, 1794. In these treaties, the United States guaranteed the Six Nations peaceful possession of the land upon which they were settled. While these guarantees might conceivably apply to parts of parcel one or two, since some Tuscaroras appear to have settled therein between 1780 and 1795 even though title was not acquired until after 1800, they cannot apply to tract three, since the tribe did not settle therein until some time after 1804 and did not acquire title until 1809. It is not reasonable to interpret either treaty, in the absence of specific language so providing, to apply the guarantees contained therein to after-acquired lands. While such an interpretation might reasonably be made where the United States had ceded or allotted the after-acquired lands to plaintiff, such a result could never obtain where the after-acquired lands were

purchased by plaintiff. In the latter eventuality, the only limit on the size of plaintiff's reservation would be the extent of its ability to purchase additional land. Certainly, it is not reasonable to assume that any of the parties to the treaties relied on by plaintiff had this result in mind.

The character of plaintiff's interest in the disputed land, and the location and control of the fee in that land, raises a two pronged problem. The first concerns the history of the specific fee involved, and the second, as mentioned previously, concerns the character of the fee in Indian lands generally.

The area in which plaintiff's land is located, originally came under the dominion of the British Crown. The area was granted to the colony of Massachusetts under a charter issued by King Charles I.[5] Apparently, the same area was granted to the colony of New York under a charter issued by King Charles II.[6] Following the signing of the peace treaty between the United States and Great Britian, which terminated the Revolutionary War, a dispute arose between the newly independent states of New York and Massachusetts as to ownership and control of the area, including plaintiff's reservation. The dispute was settled by the so-called "Hartford Compact of 1786",[7] by which the two states agreed that New York would have governmental control over what is now Western New York. The parties agreed *inter alia* to the drawing of a line running north-south from Lake Ontario along the westerly shore of Seneca Lake to the present New York-Pennsylvania border. East of this line, New York was recognized as having the pre-emption right in the land. West of this line, the line right was vested in Massachusetts. In 1791 and 1792,

Massachusetts, pursuant to the Hartford Compact, sold to Robert Morris all of its right title and interest, including "the right of pre-emption of the soil from the native Indians", to the area west of a line running generally north-south from Lake Ontario through Geneseo to the New York-Pennsylvania border.[8] Morris then conveyed all of his right, title and interest in these lands to the Holland Land Company.[9] The deeds involved in effect required Morris to extinguish the Indian right of occupancy in the lands concerned, as a result of his covenant to remove all encumbrances. Pursuant to this covenant in 1797, Robert Morris entered into an agreement at Geneseo, the so-called "Treaty of Big Tree",[10] at which the Seneca Nation transferred all of its right, title and interest to Morris for a valuable consideration. The agreement specifically reserved ten tracts of land to the Indians, not including any part of plaintiff's reservation. Some question has been raised as to whether or not the Seneca grant was left out of the treaty by inadvertence, as in the case of the Oil Springs Reservation, so that original title remained in the Seneca Nation.[11] It should be noted that a United States Commissioner, one Jeremiah Wadsworth, was present at the making of the agreement, as a result of which the United States appears to have acquiesced to the agreement. As a result of the treaty of "Big Tree", it appears that the deed of the Seneca Nation to the Tuscarora of 640 acres in 1808 was a nullity in that the Senecas had nothing to convey. The transfer was never objected to by the Holland Land Company, its successors or assigns. It might be noted that, in correspondence between Joseph Ellicott and Theop. Cazenove, both officers of the Holland Land Company, an intention was expressed to confirm the

Seneca grant, but to reserve to the Holland Land Company the pre-emptive right.[12] No formal action was taken in this regard until the company's conveyance in 1810 to David Ogden.

As a result of the above, assuming the Seneca Nation possessed the right of original Indian occupancy, and no reason appears for assuming that the truth is otherwise, the original right of Indian occupancy and the pre-emptive right in the lands now occupied by plaintiff were actually extinguished by the treaty of "Big Tree". Some question might be raised as to whether or not this is so with regard to the Seneca grant on a formal basis, in view of the 1810 conveyance by the Holland Land Company of its pre-emptive rights in 1920 acres in the Tuscarora Reservation to David Ogden,[13] this acreage being equivalent to the Seneca grant and the Holland grant to the Tuscarora Reservation combined. This interest was later conveyed by the Ogden Land Company to others[14] in 1821, and presumably resides at present in the heirs or assigns of the said grantees. There does not appear to have been a conveyance of the pre-emptive right as such in the Tuscarora purchase subsequent to the treaty of "Big Tree." In any event, the present title to all of the land of plaintiff was acquired from grantees of the sovereign who possessed the pre-emptive right, and who had previously extinguished the original right of Indian occupancy. This right, once having been extinguished, could not be revived, even if title was thereafter acquired by those who originally possessed that right. The obvious policy of the sovereign was to extinguish the original Indian title to all but reserved Indian lands. Original Indian title was viewed as an encumbrance on land, rather than a legitamate general

interest, since it could be held only by the original Indian tribes and it was the intention of the sovereign that Indians should be confined to specific tracts, and the state generally opened to white settlement. In view of this policy, it cannot be argued that original Indian title can in any manner be revived once it has been extinguished. Plaintiff here, of course, historically did not possesses original Indian title in the lands which they now occupy. They hold title by deed and not by original right of Indian occupancy.

The foregoing is as brief a sketch as possible of the title to the specific land at issue. However, to determine exactly what interest the plaintiff acquired when it acquired title, we must look to the general law regarding Indian lands. The basic statement of the legal character of such lands is to be found in the landmark opinion of Chief Justice John Marshall in *Johnson* v. *McIntosh,* 21 U. S. 542 at 583. The effect of this decision, which has been uniformly followed since its issuance in 1823, is to confirm in the Indian tribes merely a "right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it." In the earlier case of *Fletcher* v. *Peck,* 10 U. S. 87, Chief Justice Marshall said, with respect to lands within another of the thirteen colonies, to wit, Georgia, that the question whether vacant lands within the United States were joint property or belonged to the separate states had been compromised; that since the vacant land at issue therein was within the State of Georgia, that state had the power to grant it; and finally, that the nature of Indian title was such as not to be inconsistent with seizing in fee on the part of the state.

*Appendix B.*

The reasoning found in the *Johnson* and *Fletcher* cases forms the basis for the view that in the thirteen original colonies the fee to all land within the state passed directly from the Crown to the sovereign state following the revolution; that the United States never had title to such lands, and that as the Indians had at best a mere right of occupancy, the fee to their lands resided in the state. This status is in contrast to that of all lands, and particularly Indian lands, outside the original thirteen colonies, which were federally owned before being divided into sovereign states. This view is succinctly set forth in *Seneca Nation of Indians* v. *Appleby*, 112 N. Y. S. 177 at 188-89, reversed on other grounds at 196 N. Y. 318; in *Seneca Nation* v. *Christie*, 126 N. Y. 122; *Jones Cut Stone* v. *State*, 166 N. Y. S. 2d 742, and in several reports and opinions of Congressional Committees and Attorneys General. See a report on the background and status of the New York Indians submitted to the Speaker of the House of Representatives by the Department of the Interior on January 4, 1954.[15] See also *Dixon* v. *State*, 155 N. Y. S. 2d 723 and *St. Regis* v. *State*, 158 N. Y. S. 2d 540, reversed on other grounds at 168 N. Y. S. 2d 894. Collateral support for this view is also found in the rules of law, basic in New York since the time of its inception, that original and ultimate property to all lands within the jurisdiction of the state resides in the people thereof (reflected today in New York Constitution, Art. I, Sec. 10); and that no sale of Indian lands may be made without legislative consent (N. Y. Const. Art. I, Sec. 13). When Section 1007, Public Authorities Law of New York State was amended, a statement from the floor during the debate contained a direct quote showing knowledge by the Legislature that plaintiff's

lands were involved. In view of this, the Legislature must be presumed to have consented to the taking. Even if this were not so, there appears to be authority for such a taking, irrespective of legislative approval. See *St. Regis* v. *State,* 168 N. Y. S. 2d 894 at 898 899.

As a result of the character of Indian title in New York, the provision of the Pickering Treaty which, if applicable, would apparently limit grantees of the Six Nations to "the people of the United States" (Art. 3), could not refer to the Federal Government only, since the Federal Government never possessed the fee or the pre-emptive right in New York Indian lands. Indeed, the Supreme Court, in The New York Indians, 72 U. S. 761, interpreted that treaty as meaning that the Indians could sell only to the party possessed of the right of pre-emption, although this had to be done with the consent of the government. The treaty of "Big Tree", which extinguished the Indians' original right to possession in the land in issue, was acquiesced in by the United States. For this reason, that treaty also complied with the requirements of the first "Indian Non-Intercourse Act"[16] (1 Stat. 138), and also with the second "Non-Intercourse Act"[17] (1 Stat. 330). Furthermore, the character of the title to Indian lands in New York explains the holding in *Seneca Nation* v. *Christie, supra,* that New York had the power to make treaties with New York Indians for the purchase of their lands; and the holding in *United States* v. *Franklin County,* 50 F. Supp. 152, that the absence of a United States Commissioner at the making of such a treaty would not invalidate it. The character of that title also affords the basis for the holding that Indians in New York are wards of the State, and that fee to their lands resides in the State, as found in

*Seneca Nation* v. *Christie, supra; Dixon* v. *State, supra,* and other decisions. In *New York ex rel. Ray* v. *Martin,* 326 U. S. 496 (1946), the most recent decision of the Supreme Court on the subject of the peculiar status of the New York Indian, it was held, at page 499, that the power of Congress to regulate commerce with the Indian tribes, derived under the same clause of the Constitution with the power to regulate interstate commerce, is of a similar nature, the court saying, "In the absence of a limiting treaty obligation or Congressional enactment, each state had a right to exercise jurisdiction over Indian reservations within its boundaries." Finally, there are innumerable examples of the extinguishment of Indian title in New York, some involving plaintiff's land in which the United States took no part.[18] The state has, for example, long exercised the power of eminent domain over Indian lands for highway and related projects. *Wadsworth* v. *Buffalo Hydraulic Assn.,* 16 Barb. 83.

As a result of the foregoing, it is clear that the disposition of the pre-emptive rights by Massachusetts to Robert Morris was proper; that Morris' extinguishment of the original Indian right to possession conformed with applicable Federal law, that plaintiff does not now, and never did, possess that right in the lands in dispute. Whatever interest the United States has in the New York Indians is directed not to Indian lands as such, but to something more vague and general, such as their general welfare.[19] In any event, it is not directed to the land in dispute, which was given reservation status by the New York Legislature, not by the United States.

The character of the interest of the United States effectively refutes the contention by plaintiff's attorney that

since the Bureau of Indian Affairs had to approve his contract with plaintiff,[20] that the Congress therefore intended to retain control over plaintiff's land. Control of the specific matter of attorneys' contracts is not at all consistent with the absence of exercise of federal control over New York Indian lands.

Plaintiff's land is unique among Indian lands in New York, having been purchased, rather than granted or ceded by the government. Plaintiff holds record title to the lands in dispute, but the effect of that title has not been determined. The act of the Legislature in 1821, after several petitions by plaintiff, permitted plaintiff to hold its land nationally and extended to it a tax-free status, and other protections constituting reservation status. It may be claimed that this had the effect of vesting the fee in the state in return for the favored status granted.

Research reveals no previous decisions on either the ability of an Indian tribe to hold land in fee, if purchased, or the effect of giving purchased land reservation status. But that question need not be dealt with here. For it is clear that if the fee is in the state, it may be taken by the state. But if the fee is not in the state, then it is privately held. If privately held, the fee is subject to the power of eminent domain and just compensation for the taking, unless it falls within a category excluded by Federal law or the State Constitution. The plaintiff urges particularly Section 177 and Section 233 of Title 25 U. S. C. A., which was an amendment to the Indian Law becoming effective in September, 1952, and which the plaintiff claims excludes the alienation of lands in reservations in New York State. The Public Authorities Law, Section 1007 of the State

of New York, contemplates a right of eminent domain in the sovereign state as granted in Section 21 of the Federal Power Act, 16 U. S. C. A., Section 814. Moreover, the acquisition of property as taken by the State Power Authority is the method outlined in the State Highway Law of New York, Section 30. See 212 F. 2d 227. Under the Federal Power Act, as held in *Missouri* v. *Union Electric Light and Power Company*, 42 F. 2d 692, necessity for taking property under power of eminent domain is exclusively within the power of Congress to determine by direct enactment or delegation of its power to an office or board. Under this section, a licensee, such as the Power Authority of the State of New York, has a general power to take. See *Burnett* v. *Nebraska etc.*, 147 Neb. 458, 23 N. W. 2d 266; *United States* v. *Miller*, 317 U. S. 369, 63 S. Ct. 276.

There is no constitutional requirement that the appropriation now involved be specifically authorized by an Act of Congress. The Federal law urged as applicable by plaintiff has been examined above and found to present no bar to the exercise of eminent domain. The State Constitution has been examined, and, far from presenting a bar to public condemnation, discloses an intent by the state to exercise exclusive control over Indian lands in New York.

In addition, Section 233 of Title 25 U. S. C. A. in its reference to the alienation of Indian lands in New York meant merely that the general law of New York relating to the alienation of land should not, as a result of Sec. 233, be construed to apply to Indian lands, but rather that the peculiar nature of such lands (i.e. a mere possessory right in the Indian Nations), should continue to be recognized. If the Congress had intended to place an absolute restraint

on the alienation of Indian lands in New York, or to assert an absolute paramount authority in the Congress over New York Indian lands, it would not have chosen so incongruous and unlikely a time and place to do so. If such a violent departure from the long history of dealing with and treating Indian lands had been intended, the Congress would surely not have done so in so casual and off-handed a manner. The parties have adduced nothing, either by way of legislative history or legal interpretation, to indicate that such was the intent of Congress. The plaintiff alleges that further acts on the part of the Power Authority, pursuant to the statutes of the State of New York, would, except for the intervention of this court, "interfere with the effective discharge of vital functions of the Federal Government, will frustrate the powers conferred by the Constitution upon the Congress of the United States, and are unlawful and will cause irreparable damage to plaintiff, for which it has no adequate remedy at law."

(1) *Jurisdiction*—While this court does not feel that a wholly federal question is raised here, nor that the usual jurisdictional limits of this court are met by the parties herein, this court has not been able to find any authorization for an Indian Tribe or Nation to institute a suit in state court seeking the relief sought here. Solely because plaintiff would be without the right to seek its present remedy if it were not allowed to maintain this action, this court assumes jurisdiction of the action, and proceeds to a consideration on the merits. (Sec. 5 N. Y. Indian Law; *King* v. *Warner*, 137 N. Y. S. 2d 568; *Bailey* v. *Miller*, 143 N. Y. S. 2d 122.)

(2) *Three Judge Court*—Regardless of the pleadings and memoranda of the parties as to whether a constitutional

question is presented, it is for the court to determine whether or not a claim of unconstitutionality is a substantial one (*Patterson* v. *Hardin,* 145 F. Supp. 299). The view of this court is that the question presented is merely one of construction of a state statute as applied to this plaintiff. Having already determined that no substantial federal question is technically presented, and for the reasons set forth below under point 3, this court concludes that no substantial constitutional question is raised, and that defendant Power Authority's motion for a three judge court must be denied. See *Wreile* v. *Waterfront Commission of New York Harbor,* D. C. N. Y. 1955, 132 F. Supp. 166; *Howard* v. *Ladner,* D. C. Miss. 1953, 116 F. Supp. 783, remanded for dismissal 347 U. S. 910.

(3) *Propriety of Taking*—As a result of the above analysis of the history and character of plaintiff's interest in the Tuscarora Reservation, there is no adequate reason why the taking by defendants of the land in dispute should not be confirmed. The motion for a permanent injunction must be, and is, denied. The temporary restraining order hereinbefore granted by Palmieri, D. J. and modified by Sugarman, D. J., each in the Southern District of New York, is dissolved. Plaintiff's motion that the temporary restraining order be continued pending appeal to the Circuit Court is denied. Plaintiff's motion that the affidavit of Henry S. Manley be stricken as an affidavit and considered by the court as an additional brief on behalf of defendants is granted.

(4) *As to Just Compensation*—This court adopts the reasoning of Lambaise, J. in *St. Regis* v. *State,* 158 N. Y. S. 2d 540, wherein the court held that although an Indian tribe

may not bring suit in New York except by statutory authority, Section 30 of the Highway Law "would be clearly unconstitutional where it made no provision for compensation to those whose private property is to be taken for public use. While payment need not precede the taking, the provision for compensation must not only pre-exist, but it must be so definite and certain as to leave nothing open to litigation except the title to the property taken and the amount of damages which the owner may recover. *Litchfield* v. *Bond,* 186 N. Y. 66; *Sweet* v. *Rechel,* 159 U. S. 380." Neither Sec. 30 of the Highway Law nor Sec. 1007 of the Public Authorities Law set forth any restriction or limitation "upon the legal status of the owner from whom the property is taken, and implicit therefor, if not explicit therein, is the right of an owner to have his day in court to prove his title or interest and to establish his damages." Though *St. Regis* v. *State, supra,* was reversed by the Appellate Division, Third Department, at 168 N. Y. S. 2d 894, the reversal appears to have been on other grounds. It is therefore the holding of this court that there is statutory authority for plaintiff herein to bring suit in the New York Court of Claims to determine the amount of just compensation for the taking herein, and that the Court of Claims is the proper forum for determining the question of compensation. The constitutional requirement of just compensation is met. A careful reading of the statute law, and the interpretation thereof by case law above cited, indicate that plaintiff has a right of action in the courts of the State of New York. Therefore, this court declines to accept jurisdiction of the question of compensation, or to impinge upon the jurisdiction of the New York courts, and leaves plaintiff to its state remedies

in this respect. The complaint in this action is dismissed without costs. The above constitutes the findings of fact, conclusions of law and judgment of this court. The judgment is effective immediately. So ordered.

JUSTIN C. MORGAN,
JUSTIN C. MORGAN,
*United States District Judge.*

Dated: June 24, 1958.

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APPENDIX.

[1] Treaty between the United States and the Six Nations concluded at Fort Stanwix in 1784 and proclaimed October 22, 1784. 7 Stat. 15.

[2] Treaty between the United States and the Six Nations concluded at Canandaigua in 1794 and proclaimed January 21, 1795. 7 Stat. 44.

[2a] Turner, *The Pioneer History of the Holland Purchase of Western New York* (Buffalo: Geo. H. Derby & Co., 1849), pp. 182-3.

[3] Deed of Conveyance of 640 acres from Seneca Indians to Tuscarora Indians dated March 30, 1808, recorded in Liber 151, Pages 168-169, Niagara County Clerk's Office, Lockport, New York.

[4] Deed of Conveyance of 4,329 acres from Henry Dearborn, Secretary of the War Department to Tuscarora Indians dated January 2, 1809, recorded in Liber A, Page 5, Niagara County Clerk's Office, Lockport, New York.

[5] The Charter of the Colony of Massachusetts Bay in New England, 1628-9 (N. Y. Leg. Doc. No. 51, 1889, pp. 94-100).

[6] Grant from the King of England to the Duke of York, dated March 12, 1664 (N. Y. Leg. Doc. No. 51, 1889, pp. 100-104).

[7] Hartford Compact between New York and Massachusetts concluded December 16, 1786, recorded in Liber 1, pages 270-280 of Miscellaneous Records in the Cattaraugus County Clerk's Office, Little Valley, New York (N. Y. Leg. Doc. No. 51, 1889, pp. 105-111).

[8] Deed of Conveyance from the State of Massachusetts to Robert Morris dated May 11, 1791 (N. Y. Leg. Doc. No. 51, 1889, pp. 112-114).

Release and Conveyance by the State of Massachusetts to Robert Morris dated June 20, 1792 (N. Y. Leg. Doc. No. 51, 1889, pp. 115-116).

[9] Deed of Conveyance from Robert Morris to Herman LeRoy and John Lincklaen, agents for the "Holland Land Company", dated December 24, 1792 (N. Y. Leg. Doc. No. 51, 1889, pp. 117-120).

Deed of Conveyance from Robert Morris to Herman LeRoy, John Lincklaen and Gerrit Boon, agents for the "Holland Land Company", dated February 27, 1793 (N. Y. Leg. Doc. No. 51, 1889, pp. 121-123).

Deed of Conveyance from Robert Morris to Herman LeRoy, William Bayard and Matthew Clarkson, agents for the "Holland Land Company", dated July 20, 1793 (N. Y. Leg. Doc. No. 51, 1889, pp. 124-127).

Deed of Conveyance from Robert Morris to Herman LeRoy, John Lincklaen and Gerrit Boon, agents for the "Holland Land Company", dated July 20, 1793 (N. Y. Leg. Doc. No. 51, 1889, pp. 128-130).

[10] Agreement concluded between Robert Morris and the Seneca Indians at Big Tree (Geneseo, New York) September 15, 1797 (N. Y. Leg. Doc. No. 51, 1889, pp. 131-134).

[11] Royce, *Indian Land Cessions,* 18th Annual Report of the Bureau of American Ethnology, Part 2 (Washington: Government Printing Office, 1899), p. 773.

[12] Letter from Theophilius Cazenove to Joseph Ellicott dated May 10, 1798 (32 Buffalo Historical Society Publication, pp. 21-30).

[13] Deed of Conveyance from Holland Land Company to David A. Ogden, dated September 12, 1810, recorded at No. 1 of Deeds, page 68, Erie County Clerk's Office, Buffalo, New York.

[14] Deed of Conveyance from David Ogden to Robert Troup and others dated February 21, 1821, recorded in Liber One f Deeds at pp. 102-110, Cattaraugus County Clerk's Office, Little Valley, New York (N. Y. Leg. Doc. No. 51, 1889, pp. 172-181).

## *Appendix B.*

[15] Report entitled "Background Data on Indians of New York" transmitted by Assistant Secretary of the Interior Orme Lewis to the Speaker of the House of Representatives, January 4, 1954. Plaintiff's Exhibit 7.

[16] Indian Non-Intercourse Act, July 22, 1790. 1 Stat. 138.

[17] Indian Non-Intercourse Act, March 1, 1793. 1 Stat. 330.

[18] Agreement between New York Telephone Company and Niagara Mohawk Power Corporation and Chief Harry Patterson, March 1, 1951. Defendant Power Authority Appendix, pp. 122a-123a.

Agreement between Niagara Mohawk Power Corporation and Harry Patterson, March 17, 1958. Defendant Power Authority Appendix, pp. 124a-125a.

[19] Letter from Fred G. Aandahl, Assistant Secretary of the Interior to Henry Patterson, member of Council of Tuscarora Nation and owner by allotment of 500 acres of land declining under date of November 1, 1957 to aid the Tuscarora Nation in opposing the Authority's application then pending before the Federal Power Commission.

Order of Federal Power Commission—"As your reservation lands are under State jurisdiction, this department is not in a position to present your case for you." This sentence was quoted by the Federal Power Commission in its order issued March 21, 1958, which denied the application of the Tuscarora Nation for a rehearing on its objection to the licensing of the Niagara project because the reservoir is to be located on part of its land.

Plaintiff's exhibit 10; Power Authority Appendix p. 149a. See also Report of Department of Interior, Plaintiff's exhibit 7 *supra,* and plaintiff's exhibits 9A, 9B and 9C.

[20] Letter from Assistant Commissioner of the Bureau of Indian Affairs, Department of the Interior, to Messrs. Strasser, Spiegelberg, Fried and Frank, Attorneys for Plaintiff, dated May 12, 1958. Plaintiff's Exhibit No. 8A.

Notice of approval of contract entered into by the Tuscarora Indian Nation and the law firm of Strasser, Spiegelberg, Fried and Frank, authorized by the Deputy Commissioner of the Bureau of Indian Affairs, Department of the Interior, dated April 17, 1958. Plaintiff's exhibit No. 8B.

## APPENDIX C

### Statutes Involved

Indian Non-Intercourse Act of July 22, 1790 (1 Stat. 138), Section 4.

> "No sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, *or to any state, whether having the right of preemption to such lands or not,* unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." (Emphasis added.)

Indian Non-Intercourse Act of March 1, 1793 (1 Stat. 330), Section 8.

> "*And be it further enacted,* That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negociating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treaty with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless,* That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to purpose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty."

*Appendix C.*

Indian Non-Intercourse Act of June 30, 1834 (4 Stat. 729), Section 12.

"*And be it further enacted,* That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars: *Provided, nevertheless,* That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claim to lands within such state, which shall be extinguished by treaty."

25 U. S. Code § 177.

"Purchases or Grants of Lands From Indians. No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in

the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty. (R. S. § 2116.)"

25 U. S. Code § 233.

"JURISDICTION OF NEW YORK STATE COURTS IN CIVIL ACTIONS

The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State: *Provided,* That the governing body of any recognized tribe of Indians in the State of New York shall have the right to declare, by appropriate enactment prior to September 13, 1952, those tribal laws and customs which they desire to preserve, which, on certification to the Secretary of the Interior by the governing body of such tribe shall be published in the Federal Register and thereafter shall govern in all civil cases involving reservation Indians when the subject matter of such tribal laws and customs is involved or at issue, but nothing herein contained shall be construed to prevent such courts from recognizing and giving effect to any tribal law or custom which may be proven to the satisfaction of such courts: *Provided further,* That nothing in this section shall be construed to require any such tribe or the members thereof to obtain fish and game licenses from the State of New York for the exercise of any hunting and fishing rights provided for such Indians under any agreement, treaty, or custom: *Provided further,* That nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes, nor as subjecting

any such lands, or any Federal or State annuity in favor of Indians or Indian tribes, to execution on any judgment rendered in the State courts, except in the enforcement of a judgment in a suit by one tribal member against another in the matter of the use or possession of land: *And provided further,* That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians of any lands within any Indian reservation in the State of New York: *Provided further,* That nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York or making applicable the laws of the State of New York in civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952, Sept. 13, 1950, c. 947, § 1, 64 Stat. 845."

16 U. S. Code § 814.

"EXERCISE BY LICENSEE OF POWER OF EMINENT DOMAIN.

When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar

action or proceeding in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. June 10, 1920, c. 285, § 21, 41 Stat. 1074."

New York State Public Authorities Law, Art. 5, Tit. 1, § 1007.

"ACQUISITION OF PROPERTY.

If, for any of the purposes hereunder, including temporary construction purposes and the making of additions or improvements, the authority shall find it necessary or convenient for it to acquire any real property as herein defined, whether for immediate or future use, then the authority may find and determine that such property is required for a public use, and upon such due determination, such property shall be and shall be deemed to be required for such public use until otherwise determined by the authority and with the exceptions hereinafter specifically noted such determination of fact shall not be affected by the fact that such property has theretofore been taken for, or is then devoted to, a public use; but the public use in the hands or under the control of the authority shall be deemed superior to the public use in the hands of any other person, association or corporation. If the authority is unable to agree for the acquirement of any such property, or if the owner thereof shall be incapable of disposing of the same, or if, after diligent search and inquiry, the name and residence of any such owner cannot be ascertained, or if any such property has been acquired or attempted to be acquired and title or other rights therein have been found to be invalid or defective, the authority may acquire such property by condemnation under and pursuant to the provisions of this title.

1. When any real property within this state is sought to be acquired by condemnation, the authority

shall cause a survey and map to be made thereof, and shall cause such survey and map to be filed in its office. There shall be annexed to such survey and map a certificate executed by the chief engineer of the authority, or by such other officer or employee as may be designated by the trustees, stating that the property or interest therein described in such survey and map are necessary for its purposes.

2. Upon filing such survey and map the authority shall petition a special term of the supreme court held in the judicial district in which the property is located, or the county court of any county where such property is located, for the condemnation of such property or interest therein, as have not been otherwise acquired. Such petition shall be generally in the form prescribed by section four of the condemnation law so far as consistent herewith. Such petition, together with a notice of pendency of the proceeding, shall be filed in the office of the county clerk of such county and shall be indexed and recorded as provided by law. A copy of such petition together with a notice of the presentation thereof to such special term of the supreme court or to the county court shall be served upon the owners as provided in sections five and six of the condemnation law. The authority may cause a duplicate original affidavit of the service thereof to be recorded in the books used for recording deeds in the office of the county clerk of the county wherein the property described in such notice is situated, and the recording of such affidavit shall be prima facie evidence of due service thereof.

3. At any time after the recording of the petition and notice as above provided the authority may enter upon and use and occupy all the parcels of real estate described in the proceedings for the condemnation thereof, provided that it shall first deposit with the court a sum equal to the assessed valuation of such real property, or in the event that the assessed valuation thereof cannot readily be ascertained, such sum as in its judgment shall be sufficient as compensation

for the real property acquired. The sum so deposited shall be applied as provided in section twenty-four of the condemnation law. Upon the recording of the petition and notice and the making of the deposit, the owner or person in possession of such real property shall deliver possession thereof to the authority upon demand, and in case possession is not delivered when demanded, or demand is not convenient because of absence of the owner or inability to locate or determine the owner, the authority may apply to the court without notice for an order requiring the sheriff to put it into possession of such real property. Such an order must be executed as if it were an execution for the delivery of the possession of the property.

4. The proceedings thereafter shall be in the manner prescribed by the condemnation law so far as consistent herewith.

5. The commissioners appointed to ascertain and determine the compensation which ought justly to be made to the owners of property or interests therein appraised by them as provided in section thirteen of the condemnation law shall make their report of the value thereof to the supreme court within one hundred days from the date of their qualification.

6. The persons or corporations whose property shall have been taken by condemnation and who shall have agreed upon the compensation to be paid therefor in settlement of the proceeding, or to whom an award of compensation shall have been made by the court, shall be entitled to payment of the agreed or awarded compensation within three calendar months after the date of the agreement upon the amount of the compensation or of the entry of the order confirming the report of the commissioners of appraisal, together with interest upon the amount of such compensation from the time of the entry and appropriation thereof by the authority, to the date of payment of such compensation; but such interest shall cease upon the service by the authority, upon the person or corpo-

ration entitled thereto, of a fifteen days' notice that the authority is ready and willing to pay the amount of such compensation upon the presentation of proper proofs and vouchers. Such notice shall be served personally or by registered mail and publication thereof at least once a week for three successive weeks in a daily newspaper, having a general circulation in the county where such property or any part thereof is located.

7. The authority may, at its option, acquire such real property within the state of New York, under the general condemnation law or, in the event it is a licensee of the federal power commission it may acquire such real property as is necessary for its purposes through the exercise of the right of eminent domain as provided in section twenty-one of the federal power act, as amended.

8. The authority and its duly authorized agents and employees may enter upon any real property for the purpose of making the surveys or maps mentioned in this section, or for such other surveys or examinations of real property as may be necessary or convenient for the purposes of this title.

9. The term "real property" as used in this title is defined to include lands, structures, franchises and interests in land, including lands under water and riparian rights, and any and all other things and rights usually included within the said term, and includes also any and all interests in such property less than full title, such as easements, rights of way, uses, leases, licenses and all other incorporeal hereditaments and every estate, interest or right, legal or equitable, including terms for years and liens thereon by way of judgments, mortgages or otherwise, and also all claims for damages for such real estate.

10. The authority may determine what real property is reasonably necessary for the improvement and development of the Niagara river or the international rapids section of the St. Lawrence river. If funds

are made available by the authority to the state for payment of the cost and expense of the acquisition thereof, the superintendent of public works, when requested by the authority, shall acquire such real property in the name of the state by appropriation and, where necessary, remove the owner or occupant thereof and obtain possession, according to the procedure provided by section thirty of the highway law, insofar as the same may be applicable. The authority shall have the right to possess and use for its corporate purposes, so long as its corporate existence shall continue, all such real property and rights in real property so acquired.

Claims for the value of the property appropriated and for legal damages caused by any such appropriation shall be adjusted and determined by the superintendent with the approval of the authority, or by the court of claims as provided in said section thirty. When a claim has been filed with the court of claims, the claimant shall cause a copy of such claim to be served upon the authority and the authority shall have the right to be represented and heard before such court. All awards and judgments arising from such claims shall be paid out of moneys of the authority.

The authority may determine whether any property appropriated pursuant to this section, while under its jurisdiction, should be sold or exchanged in whole or in part, on terms beneficial to the state and the authority, and in all cases where such a determination is made, the authority may sell or exchange such property. Where the authority finds it practicable and reasonable, the former owner, from whom the property was appropriated, his heirs, successors in interest and assigns, shall be given the first opportunity to purchase such property at its fair market value. In order to carry any such sale or exchange into effect the authority is hereby authorized to execute and deliver in the name of the people of the

state a quit claim of such property. Money proceeds of any such sale shall be retained by the authority. Title to property received upon such exchange shall be acquired in the name of the state, and the authority shall have the same rights of occupation and use thereof and shall be vested with the same rights with respect thereto as is provided in this section and in section one thousand eight as to property of the state. Where property appropriated pursuant to this section is required by the Saint Lawrence Seaway Development Corporation, created pursuant to public law three hundred fifty-eight of the 83rd Congress, or any successor corporation, the authority may convey such property to such corporation, and, if the license issued to the authority by the federal power commission shall so require, such conveyance may be made without consideration.

The attorney general is hereby authorized and empowered to certify to such Saint Lawrence Seaway Development Corporation, the right, title or interest vested in the name of the people of the state of New York in and to property appropriated pursuant to this section and proposed to be conveyed to such Saint Lawrence Seaway Development Corporation as hereinbefore provided."

New York State Highway Law § 30.

ACQUISITION BY THE STATE OF PROPERTY REQUIRED FOR THE CONSTRUCTION AND RECONSTRUCTION OF STATE HIGHWAYS AND STRUCTURES THEREON.

1. (a) Upon the construction, reconstruction or improvement, pursuant to this chapter of a state highway the property required therefor may be acquired by the state by appropriation as hereinafter provided. A state highway indicated under this chapter for construction or improvement, or any portion of such high-

way, may be constructed, reconstructed or improved, as a controlled access highway, upon the adoption of a resolution by a majority vote of the members of the board of supervisors of the county in which the highway is to be contructed. The resolution of the board of supervisors herein referred to shall not be required in relation to highways to be projected as through truck routes and principally on new location.

(b) Whenever plans for the construction, reconstruction or improvement of a state highway which is now or which shall hereafter be designated in section three hundred forty or section three hundred forty-one of this chapter, shall provide for the relocation of such state highway or portion thereof on a location which deviates from the location of the existing highway for a continuous length in excess of one mile as measured along the center line of the existing highway, the superintendent of public works shall, before filing the descriptions and the original tracings of any maps or proceeding with the acquisition of property or the work of construction, reconstruction or improvement, transmit such plans to the board of supervisors of each county in which such relocation or any portion thereof is situated. In case the relocation or any portion thereof as proposed, is situated in a county other than the county in which the existing highway or portion thereof is located, such plans shall be transmitted to both of such counties and shall be subject to the approval, disapproval or modification by each of such counties in the manner as hereinafter provided. The board of supervisors, after the receipt of such plans, may conduct a public hearing or hearings upon such notice as such board of supervisors shall deem reasonable, but not less than ten days, to the superintendent of public works and to such other party or parties deemed by said board of supervisors to be interested in the project. In any event, and within ninety days after receipt of the plans, the board of supervisors shall, by resolution, duly adopted by a majority vote

of its members, approve, disapprove or recommend modifications in such plans as the public interest shall require. Within ten days after the adoption of the resolution, the clerk of the board of supervisors shall mail a certified copy thereof to the superintendent of public works. In case such relocation is situated in two or more counties, such resolution must be separately adopted by the board of supervisors of each county as to the relocation situated therein. The form of the resolution shall be prescribed by the superintendent of public works. In case the board of supervisors shall disapprove the plans, without proposing modifications, the superintendent of public works may, in his discretion, prepare and submit to the board of supervisors for approval other plans for the construction, reconstruction or improvement of the state highway to be acted upon by the board of supervisors in the manner herein prescribed within sixty days after receipt of such plans. In case the board of supervisors shall disapprove the plans, and shall recommend modifications, the superintendent of public works may approve the plans as so modified, or recommend other modifications for approval, and such state highway shall be constructed, reconstructed or improved in accordance with such plans as finally approved. When the plans, for construction, reconstruction or improvement of a state highway have finally been approved as herein provided, no resolution thereafter adopted by the board of supervisors of a county shall rescind, annul or modify such prior resolution either directly or indirectly, excepting upon the advice and with the consent of the superintendent of public works. Upon the failure or omission of any board of supervisors to act within the time and manner herein required, the said plans shall be deemed to be approved so far as such board of supervisors is concerned.

2. The superintendent of public works, for and in behalf of the people of the state of New York may ac-

quire by appropriation any and all property necessary for the construction, reconstruction and improvement of state highways and bridges or culverts on the state highway system, including the appropriation of property for drains, ditches, spoil banks, gravel pits and stone quarries; also for the removal of obstructions, improvement of sight distances; also for appropriation of property for the reconstruction of existing highway-railroad separation structures and for the separation of highway-railroad grades on newly laid-out highways; and for other purposes to improve safety conditions on the state highway system. The term "property" as used in this section is defined to include lands, waters, rights in lands or waters, structures, franchises and interests in land, including lands under water and riparian rights, and any and all other things and rights usually included within the said term and includes also any and all interests in such property less than full title, such as easements permanent or temporary, rights-of-way, uses, leases, licenses and all other incorporeal hereditaments and every estate, interest or right legal or equitable. The manner of appropriation, including method of obtaining possession, shall be as hereinafter set forth.

3. The superintendent of public works shall cause to be prepared an accurate description and map of any and all property which he may deem necessary for purposes connected with the highway system of the state of New York or of any property in and to which he may deem the acquisition or exercise of an easement, interest or right to be necessary for such purposes, indicating and describing in each case the particular easement, interest or right. On the approval of such description and map by the superintendent of public works, he may acquire such property, easements, interests or rights by appropriation as prescribed by this section.

4. Such description and the original tracing of such map shall be filed in the office of the department of

public works, which shall cause a certified copy of such description and map to be filed in the office of the department of state.

5. On the filing of such description and map in the office of the department of state, the people of the state of New York, their officers and agents, may immediately enter upon and take possession of the property so described for any and all purposes connected with the highway system of the state of New York.

6. A copy of such description and map shall be filed by the superintendent of public works in the office of the county clerk or register of each county in which such property, or any portion thereof, is situated and thereupon the appropriation by the state of the property described in such description and map shall be deemed complete and the title to such property shall be vested in the people of the state of New York.

7. If the superintendent of public works shall determine, prior to the filing of such description and map in the office of the county clerk or register of the county, that changes, alterations or modifications of such description and map as filed in the office of the department of state should be made, he shall direct the preparation of an amended description and map. On the approval of such amended description and map by the superintendent of public works, and by the board of supervisors of each county as to the property located therein, if required by paragraph (b) of subdivision one, it shall be filed in the office of the department of state in the same manner as the original description and map was filed and the amended description and map shall thereupon in all respects and for all purposes supersede the description and map previously filed.

8. If the superintendent of public works shall determine prior to the filing of such copy of the description and map in the office of the county clerk or register as aforesaid, that such description and map should be

withdrawn, he may with the approval of the board of supervisors of each county affected, if required by paragraph (b) of subdivision one, file a certificate of withdrawal in the offices of the department of state and department of law. Upon the filing of such certificate of withdrawal, the description and map to which it refers shall be cancelled and all rights thereunder shall cease and determine.

9. The superintendent of public works shall deliver to the attorney-general a copy of such description and map, whereupon it shall be the duty of the attorney-general to advise and certify to the superintendent of public works the names of the owners of the property, easements, interests or rights described in the said description and map, including the owners of any right, title or interest therein.

Upon such certification, the superintendent of public works shall cause a notice of appropriation to be filed and recorded in the office of the county clerk or register of the county in which such property is situated. Such notice shall be directed to the owners so certified; shall set forth the date of the filing of a certified copy of the description and map in the office of the department of state, and the date of the filing of a copy of the description and map in the office of the said county clerk or register; and shall state that title to the property, easements, interests or rights described in such description and map vested in the people of the state of New York upon such filing in the office of the said county clerk or register.

It shall be the duty of such county clerk or register, upon the filing of the notice of appropriation, to record the same in the books in his office used for recording deeds and to index the same in the deed index books in his office, listing the names of the persons to whom such notice is directed as grantors.

The notice of appropriation provided for herein may be directed to the owners certified by one or more

notices addressed to them separately or in such manner as the superintendent of public works may elect, and the provisions of this section shall apply to each of such notices.

10. The superintendent of public works shall cause a copy of such description and map and notice of appropriation to be served personally on each owner so certified, if the person to be served can be found within the state. The superintendent of public works shall cause proof of such service to be filed and recorded in the office of the county clerk or register aforesaid. It shall be the duty of such county clerk or register, upon the filing of the proof of such service, to record the same in the books in his office used for recording deeds, and to index the same in the deed index books in his office, listing the name of the person served as a grantor. The record of the proof of such personal service shall be presumptive evidence of due service of such description and map and notice of appropriation on the person served.

Service of a copy of such description and map and notice shall not be required to be made on any owner whose claim arising from or growing out of such appropriation has been released to, or for the benefit of, the people of the state of New York.

11. If the superintendent of public works is unable to serve a copy of such description and map and notice of appropriation, or cause the same to be served, upon an owner personally within the state, after making an effort so to do which he shall deem to be reasonable and proper, service in lieu thereof may be made by the superintendent of public works (a) by causing such description and map and notice of appropriation to be filed in the office of the county clerk or register aforesaid and (b) by causing such notice to be recorded in the said office.

The superintendent of public works shall simultaneously therewith cause his certificate to be filed and

recorded in the said office, which certificate shall state that he has been unable to serve a copy of such description and map and notice of appropriation, or cause the same to be served, upon such owner personally within the state, after an effort so to do which he deems reasonable and proper, and which shall direct that service be effected by filing and recording as herein provided.

It shall be the duty of such county clerk or register, upon the filing of the notice of appropriation and certificate, to record the same in the books in his office used for recording deeds, and to index the same in the deed index books in his office, listing the person named in such certificate as a grantor. The record of such notice and certificate shall be presumptive evidence of due service of such description and map and notice of appropriation on the person named in the said certificate.

12. If, at or after the vesting of title to such property in the people of the state of New York in the manner provided for in this section, the superintendent of public works shall deem it necessary to cause the removal of an owner or other occupant from such property, he may cause such owner or other occupant to be removed therefrom and the possession to be delivered to him in the same manner and by the same proceedings and before the same officers as in the case of a tenant holding over after the expiration of his term without permission of his landlord, except as follows: the petition shall be preceded by forty days' notice to quit, in the form and served in the manner prescribed by section fourteen hundred sixteen of the civil practice act, and the giving of such notice shall be stated in the petition. The proceedings shall be brought in the name of the superintendent of public works as agent of the state. If any person proceeded against shall, on return of the precept, contest the petition by an answer, the attorney-general shall be notified, and he thereafter shall represent the petitioner in the proceedings. No execution shall issue for costs, if any,

awarded against the state or the superintendent of public works, but they shall be part of the costs of the acquisition and be paid in like manner. Proceedings may be brought separately against one or more of the owners or other occupants of a property, or one proceeding may be brought against all or several of the owners or other occupants of any or all property within the territorial jurisdiction of the same justice or judge; and in any case precepts or final orders shall effect or be made for immediate removal of persons defaulting in appearance or in answering, or withdrawing their answers, if any, without awaiting the trial or decision of issues raised by contestants, if any.

13. Claims for the value of the property appropriated and for legal damages caused by any such appropriation may be adjusted by the superintendent of public works, even though a claim has been filed with the court of claims, if the amount thereof can be agreed upon with the owner or owners thereof. If the amount of a claim cannot be agreed upon, the superintendent of public works may enter into an agreement with the owner or owners providing for payment of an amount equal to sixty per cent of the amount determined by the superintendent to be the value of such claim reserving to such owner or owners, however, the right to file such claim with the court of claims or if a claim has been filed reserving the right to prosecute said claim. The reservation of the right to file said claim in the court of claims shall not extend or affect in any way the time limited for the filing of such claim as provided for in the court of claims act. Upon making any such agreement, the superintendent of public works shall deliver to the comptroller such agreement and a certificate stating the amount due such owner thereunder on account of such appropriation of his property and the amount so fixed shall be paid out of the state treasury after audit by the comptroller from moneys appropriated for the construction, reconstruction or improvement of state highways and bridges,

but not until there shall have been filed with the comptroller a certificate of the attorney general showing the person or persons claiming the amount so agreed upon to be legally entitled thereto.

14. The owner of any property, easements, interests or rights appropriated, may present to the court of claims a claim for the value of such property appropriated and for legal damages, as provided by law for the filing of claims with the court of claims. Awards and judgments of the court of claims shall be be paid in the same manner as awards and judgments of that court for the acquisition of lands generally and shall be paid out of the state treasury from moneys appropriated for the construction, reconstruction or improvement of state highways and bridges; provided, however, that in the event the award or judgment exceeds the amount determined by the superintendent of public works to be the value of the claim as adjusted subsequent to trial, only that portion of the award or judgment which does not exceed such amount shall be paid from moneys appropriated for such highway and bridge purposes, and that portion of the award or judgment which exceeds such amount shall be paid, together with interest on the total award or judgment, out of the state treasury from moneys appropriated to the court of claims for general state charges.

15. If the work of constructing, reconstructing or improving such state highways and bridges causes damage to property not acquired as above provided, the state shall be liable therefor, but this provision shall not be deemed to create any liability not already existing by statute. Claims for such damage may be adjusted by the superintendent of public works, if the amounts thereof can be agreed upon with the persons making such claims, and any amount so agreed upon shall be paid as a part of the cost of such construction, reconstruction or improvement as prescribed by this section. If the amount of any such claim is not agreed upon, such claim may be presented to the court of claims

which is hereby authorized to hear such claim and determine if the amount of such claim or any part thereof is a legal claim against the state and, if it so determines, to make an award and enter judgment thereon against the state, provided, however, that such claim is filed with the court of claims within six months after the acceptance by the superintendent of public works of the final estimate of the completed contract, pursuant to an official order duly filed in the department.

15-a. Notwithstanding any other provision of this section, the superintendent of public works shall have the power to acquire by grant or purchase, in the name of the people of the state of New York, any property which he deems necessary for any of the purposes provided for in this section and may also acquire for such purposes from the Palisades interstate park commission, in the name of the people of the state of New York, such lands and such easements, licenses, permits or other rights over lands as the said commission is authorized to grant, sell, exchange or convey. Payment therefor, if any, shall be made in the manner prescribed in this section for the payment of adjusted appropriation claims, provided, however, that no real property shall be so acquired unless the title thereto shall be approved by the attorney-general.

16. The expense of the acquisition of property including the cost of making surveys and preparing descriptions and maps of property to be acquired, and of administrative duties in connection therewith, serving notice of appropriation, publication, making title searches, appraisals and agreements, and examinations and readings and approval of titles made by the attorney-general, and expenses incurred by the superintendent of public works or the attorney-general in proceedings for removal of owners or occupants, shall be deemed part of the cost of such improvement. The comptroller is hereby authorized to charge against any moneys available for the construction and reconstruc-

tion or improvement of state highways and bridges and to reserve therefrom such sums as may be sufficient to defray the necessary expenses to be incurred by the attorney-general for examination, readings, and approval of titles, upon the filing with him by the attorney-general from time to time of a certificate or certificates approved by the superintendent of public works setting forth such estimated expenses. Such expenses shall be paid from the funds so reserved after audit by the state comptroller.

17. Notwithstanding the provisions of any general, special or local law, the superintendent of public works, his officers, agents or contractors when engaged on work connected with the highway system of the state of New York, as described in subdivision two of this section, may enter upon any property for the purpose of making surveys, test pits, test borings, or other investigations. Claims for any damage caused by such work not exceeding five hundred dollars may be adjusted by agreement by the superintendent of public works without appropriating such property, and payment shall be made in like manner as provided in this section for any and all property appropriated for the highway system of the state of New York.

18. The superintendent of public works may determine whether any property heretofore or hereafter acquired pursuant to this section for any of the purposes connected with the highway system of the state of New York may be, in whole or in part, sold or exchanged on terms beneficial to the state, and in all cases of such determination he may, notwithstanding the provisions of any general, special or local law, so dispose of such property, provided however, that on highways where access is not controlled such disposal of property shall not thereby deprive an owner of any existing frontage thereon immediately in front of his premises. In order to carry any such sale or exchange into effect the superintendent of public works is hereby authorized to execute and deliver, in the

name of the people of the state, a quitclaim of, or a grant in and to, such property. Each such instrument of conveyance shall be prepared by the attorney-general and before delivery thereof, shall be approved by him as to form and manner of execution.

19. If the superintendent of public works deems it necessary to acquire immediately any property which is in the bed or beds of any streams, lakes, streets, roads, highways, or rights of way for purposes connected with such highway projects, he may proceed in the manner provided in subdivisions three, four and five of this section. A copy of such description and map shall be filed by the superintendent of public works in the office of the county clerk or register or each county in which such property is situated and thereupon the appropriation by the state of the property described in such description and map shall be deemed complete and the title to such property shall vest in the people of the state of New York.

Upon the completion of the filing in the office of the county clerk or register as aforesaid, the superintendent shall cause a notice of such filing of the description and map, together with a description of such property, to be published at least once in a newspaper published and having general circulation in each county where such property is situated. Claims for the value of the property appropriated and for legal damages caused by any such appropriation may be adjusted by the superintendent of public works in the manner provided in this section even though a claim has been filed with the court of claims and in all cases where claims for such damages have been agreed upon or an award has been made by the court of claims, the claimant shall submit to the attorney-general such proof of title to the property so acquired as shall be satisfactory to the attorney-general. All other provisions in this section relating to claims on account of such appropriation shall apply to claims which may arise under this subdivision with the same force and effect.

20. If the superintendent of public works shall determine subsequent to the appropriation of a temporary easement right in property and subsequent to the filing of a description and map of such property in the office of the county clerk or register, as aforesaid, that the purposes for which such easement right was acquired have been accomplished and that the use and occupancy of said property for state highway purposes are no longer necessary, and that, therefore, the term of such easement should be further limited, or if the appropriation of such easement was for an indefinite period, that such period should be fixed and determined, or that the period of such easement has by its terms expired, he shall make his certificate that the use and occupancy of such property for state highway purposes are no longer necessary, that the property in which such easement right was acquired is surrendered back to the affected owner of said property and that such easement right is thereupon terminated, released and extinguished. The superintendent of public works shall cause a copy of such certificate to be filed in the office of the department of state. Upon the filing of such certificate in the office of the department of state all rights acquired by the state in such property shall cease and determine. The superintendent of public works shall cause a copy of such certificate together with notice of the filing thereof in the office of the department of state to be mailed to the owner of the property affected, as certified by the attorney-general, if the place of residence of such owner is known or can be ascertained by a reasonable effort. A further copy of such certificate and notice of filing shall be filed in the office of the recording officer of each county wherein the property affected is situated. On the filing of such certificate and notice with such officer it shall be the duty of such officer to record same in the books used for recording deeds in the office of such officer."

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

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No. 386

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JOHN W. JOHNSON, Superintendent of Public Works of the State of New York, *Appellant,*

v.

TUSCARORA NATION OF INDIANS also known as TUSCARORA INDIAN NATION, *Appellee.*

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**On Appeal from the United States Court of Appeals for the Second Circuit**

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## SUGGESTION OF MOOTNESS AND MOTIONS TO AFFIRM AND/OR DISMISS

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Appellee in the above-entitled case moves to affirm and/or dismiss the portion of the judgment appealed from on the grounds that (1) both questions presented have become moot insofar as the appellant is concerned by virtue of subsequent litigation, (2) the questions presented by the appeal are so unsubstantial as not to

need further argument, and (3) the second question presented is not within the appeal jurisdiction of this Court.

## STATEMENT

Appellee, the Tuscarora Nation of Indians, is a recognized tribe of American Indians owning and occupy a reservation of 6,249 acres in Niagara County, New York. Approximately 1,000 acres of that reservation are included in the proposed reservoir area of the hydroelectric facilities known as the Niagara Project. A license for the construction and operation of the Niagara Project was issued on January 30, 1958, to the Power Authority of the State of New York after a hearing and decision by the Federal Power Commission. The validity of that license has been contested by the appellee, a matter which is presently pending before the United States Court of Appeals for the District of Columbia Circuit. *Tuscarora Indian Nation* v. *Federal Power Commission,* No. 14,475.

The instant case had its direct origin in the action of the Power Authority of the State of New York in seeking to implement its Federal Power Commission license. Purportedly acting "pursuant to Article 5, Title 1 of the Public Authorities Law and the applicable provisions of Section 30 of the Highway Law" of New York, the Power Authority sought to appropriate some 1,383 acres of land in the Tuscarora Reservation for use as a storage reservoir. In accordance with the procedures established by the aforementioned Public Authorities Law and the Highway Law, the following procedural events took place:

1. On February 17, 1958, the trustees of the Power Authority determined that acquisition of the Tuscarora land was required for public use in connection with the Niagara power project.

2. On March 21, 1958, the Power Authority filed a petition for a judgment of condemnation of the Tuscarora land in the Supreme Court of New York, Niagara County. The authority for the condemnation was said to be the Public Authorities Law.

3. On April 11, 1958, an amendment to the Public Authorities Law became effective whereby express authority was purported to be given to the Power Authority to utilize the appropriation procedure of the Highway Law to acquire real property for the improvement and development of the Niagara River.

4. The Power Authority thereupon completely abandoned the previously instituted condemnation case in the state court and invoked the appropriation procedure of the Highway Law by requesting the appellant, as Superintendent of Public Works, to acquire the land in the name of the State.

5. Pursuant to Section 30 of the Highway Law, the appellant took a map supplied to him by the Power Authority and filed it on April 14, 1958, in the Office of the Secretary of the State and on the following day he filed an additional copy in the Office of the County Clerk of Niagara County. The filing of the map in the latter office made the appropriation complete and purported to vest title to the property in the people of the State of New York.[1] The appellant's functions in this procedure were entirely ministerial.

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[1] Par. 7 of Sec. 30 of the New York State Highway Law, quoted at p. 69 of Jurisdictional Statement, Appendix C.

Agents of the Power Authority made immediate attempts to enter upon and take possession of the land thus "appropriated".

Because of the obvious and imminent threat to its lands, appellee filed a complaint in the United States District Court for the Southern District of New York. This complaint sought a declaratory judgment to the effect that the Power Authority had no right to acquire lands of the appellee without the express consent of the United States and a permanent injunction prohibiting the Power Authority and the appellant from acquiring or attempting to acquire lands belonging to the appellee in the absence of such consent. The appellant was made a party to the proceeding solely because of his ministerial functions in accepting and filing the map of the power project, as outlined above.

The District Court for the Western District of New York, following the transfer of the case to that court,[2] denied the motion for a permanent injunction and dismissed the complaint.[3] The Court of Appeals for the Second Circuit, however, reversed the District Court insofar as it had dismissed the complaint and thereby had blocked the appellee from any relief by way of a declaration of rights.[4] The court held that the Federal Government, by virtue of 25 U.S.C. §§ 177 and 233, had retained paramount authority to control the alienation of Indian tribal lands in New

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[2] The case was removed from the District Court for the Southern District of New York pursuant to 28 U.S.C. §§ 1392(b) and 1406(a). *Tuscarora Nation of Indians* v. *Power Authority of the State of New York*, 161 F. Supp. 702 (S.D.N.Y., 1958).

[3] The opinion of that court appears at p. 35 of the Jurisdictional Statement, Appendix B.

[4] The opinion of the Court of Appeals appears at p. 14 of the Jurisdictional Statement, Appendix A.

York and that the state could not acquire those lands without the express consent of the United States. The court further found that the Congressional consent with respect to the taking of the Tuscarora land was to be found in the direction given by Congress to issue a license to the Power Authority (71 Stat. 401) and in the vesting in licensees of the governmental power of eminent domain (Sec. 21 of the Federal Power Act, 16 U.S.C. § 814).

The Court of Appeals then made two critical rulings which must be considered separately and apart from each other:

(1) The court ruled that Congress had not authorized the taking of Indian lands pursuant to the eminent domain procedures of the Highway Law and the Public Authorities Law of New York. Hence the proceedings under those statutes were vacated and annulled.

(2) The court also ruled that the only appropriate method of taking appellee's land was by condemnation proceedings in either a state or federal court. The court then requested that the federal district court, should the Power Authority elect to exercise its right of eminent domain in that court, "expedite all proceedings as much as possible."[5]

Pursuant to the second ruling, the Power Authority completely abandoned the appropriation proceedings under the state statutes and elected to institute an en-

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[5] This second ruling was the subject of the petition for certiorari filed by the appellee in No. 384, October Term, 1958, *Tuscarora Nation of Indians* v. *Power Authority of the State of New York, et al.* The petition was denied on October 13, 1958. The appellant Johnson was named a respondent in that petition solely because he had been a party to the proceedings before the Court of Appeals in his ministerial capacity.

tirely new condemnation case in the federal district court. *Power Authority of the State of New York* v. *1383.55 Acres of Land, etc.* (Civil Action No. 7934, W. D. N. Y.). The appellant Johnson, however, is not a party to, and is in no way affected by, this new and still pending condemnation proceeding.

## SUGGESTION OF MOOTNESS

The questions which the appellant Johnson seeks to raise on this appeal are twofold:

1. Whether the exercise of New York's sovereign power of eminent domain as to Indian reservations is repugnant to the federal statutes establishing the supremacy of the United States over such reservations, 25 U.S.C. §§ 177 and 233; and

2. Whether the acquisition of title to appellee's lands by state eminent domain procedures set forth in the New York Highway Law and the New York Public Authorities Law is repugnant to Section 21 of the Federal Power Act, 16 U.S.C. § 814.

Both of these questions necessarily relate to the abandoned effort by the Power Authority to utilize the eminent domain procedures set forth in the two New York statutes. As has been stated by the Power Authority in its brief in opposition to certiorari in No. 384, Oct. Term 1958, before this Court (pp. 31-32):

> "In taking steps to acquire petitioner's [appellee's] land in the name of the State by appropriation, Johnson acted strictly in a ministerial capacity and his sole purpose was to make the land available to the Power Authority which needed it for its Niagara Power Project and will have to pay for it.

> "The Authority has abandoned efforts to obtain possession of the land by appropriation [pursuant to the Highway Law and the Public Authorities Law of New York], has already acquired possesion of part of it for transmission lines in the condemnation proceeding it brought in the District Court for the Western District of New York and is perfectly content to acquire the balance in that proceeding."

It is thus apparent that there is no occasion for this Court to pass upon questions which have relevance only to state statutory proceedings which have been abandoned. The appellant Johnson had at most a ministerial function in those proceedings and he is without power or interest to reinstitute or prosecute such proceedings without the cooperation of the Power Authority. He has no standing to complain of the abandonment of those proceedings. And he likewise has no standing to request that this Court issue an advisory opinion on the questions presented for use in possible future attempts by the Power Authority or others seeking to utilize the state statutory eminent domain procedures.

In other words, the appellant is now seeking to invoke the appeal jurisdiction of this Court on abstract questions of power as between New York and the United States without any showing of a *current or continuing* prejudicial injury to the proprietary rights of New York or its rights of physical dominion. This he may not do. *Massachusetts* v. *Mellon,* 262 U.S. 447, 480-485 (1923); *New Jersey* v. *Sargent,* 269 U.S. 328 (1926); *Texas* v. *Interstate Commerce Commission,* 258 U.S. 158 (1922).

For these reasons, appellee suggests that the issues sought to be raised are moot as to the appellant Johnson and that the appeal should be dismissed on that ground.

**MOTION TO AFFIRM**

Appellee moves to affirm the portion of the judgment below sought to be reviewed on the ground that the questions presented are so unsubstantial as not to need further argument.

Both federal and state courts consistently have ruled that the United States possesses paramount power to control and govern the territory reserved and held by Indians, including tribal lands in the State of New York. *Worcester* v. *Georgia,* 6 Pet. (U.S.) 515 (1832); *The Kansas Indians,* 5 Wall. (U.S.) 737 (1867); *United States* v. *Candelaria,* 271 U.S. 432 (1926); *Board of County Commissioners* v. *Seber,* 318 U.S. 705 (1943); *United States* v. *Forness,* 125 F. 2d 928 (C.A. 2, 1942); *People ex rel. Cusick* v. *Daly,* 212 N.Y. 183 (1914).

The courts also have held uniformly that the Federal Government occupies a special position as the guardian and protector of Indian tribes, including those resident in the State of New York. *United States* v. *Kagama,* 118 U.S. 375 (1886); *People ex rel. Cusick* v. *Daly, supra; Mulkins* v. *Snow,* 232 N.Y. 47 (1921); *Patterson* v. *Seneca Nation,* 245 N.Y. 433 (1927). Only Congress can determine when that fiduciary relationship shall cease. *Winton* v. *Amos,* 255 U.S. 373 (1921).

The conveyancing or alienation of Indian land still remains within the sphere of superior federal power and control, even though certain elements of jurisdic-

tion have been transferred from the United States to the State of New York.[6] After thoroughly reviewing the pertinent statutes (25 U.S.C. §§ 177 and 233) and court decisions, the Court of Appeals below properly concluded (Jurisdictional Statement, p. 26) that "Not only has Congress not abandoned the field with respect to the property interests of Indian tribes in the State of New York but it has by the enactment of the express reservation concerning land interests of the Indian tribes in New York in Title 25 U.S.C.A. § 233, pointed up and reaffirmed its paramount authority over Indian tribal lands."

Appellant cites no case in this Court which in any way casts doubt on the correctness of that conclusion or on the continuing validity of the federal supremacy principle Indeed, so well settled is that principle that any attempt like the instant one to question it falls into the category of unsubstantiality not meriting further argument. For that reason alone, the portion of the judgment below appealed from should be affirmed.

## MOTION TO DISMISS

Appellee moves to dismiss the appeal insofar as the second question presented is concerned since that question is not within the appeal jurisdiction of this Court as invoked by the appellant.

The jurisdiction invoked by the appellant is that contained in 28 U.S.C. § 1254(2), which refers to appeals "by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Con-

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[6] Precisely this conclusion is reached in Report No. 1 of the Inter-Law School Committee, State of New York Special Legislative Committee on the Revision and Simplification of the Constitution, N.Y. Leg. Doc. No. 57 (May, 1958), pp. 38-39.

stitution, treaties or laws of the United States." This means that the decision of the Court of Appeals below, as to which the appeal relates, must be based squarely on a finding that a state statute relied upon by the appellant is contrary or repugant in its operation and effect to federal law. *Public Service Commission* v. *Batesville Telephone Co.,* 284 U.S. 6 (1931). The second question of the instant appeal does not meet the requirements of this appeal jurisdiction.

The court below made no finding, to use the language of the second question presented by the Jurisdictional Statement (p. 3), that "acquisition of title by eminent domain under the procedure set forth in New York Public Authorities Law, Art. 5, Tit. 1 § 1007 and New York Highway Law, § 30 [is] repugnant to 16 U.S. Code § 814 (Federal Power Act § 21)." The court simply held, *as a matter of construction of Section 21 of the Federal Power Act,* that Congress had not chosen the procedure set forth in the two New York statutes as a means of eviction pursuant to the federal eminent domain power. In the words of the court, "If Congress had intended this procedure to be followed, section 814 instead of providing 'in the state courts' would have read 'or in such manner as may be prescribed by the legislature of the state in which the property is located.' . . . If Congress wishes this to be the method of eviction it should at least so declare in specific terms." (Jurisdictional Statement, p. 32).

Thus the court below did nothing more than construe Section 21 of the Federal Power Act and conclude that Congress had not therein chosen to utilize the state procedure here involved. Such a holding is not tantamount to finding the state procedure or its underlying state statutes repugnant or contrary to federal law. It

is simply a matter of construction of a federal statute. And such a matter does not rise to the status of an appealable issue under 28 U.S.C. § 1254(2). See *Quong Ham Wah Co.* v. *Industrial Accident Commission,* 255 U.S. 445, 448 (1921); *Ross* v. *Oregon,* 227 U.S. 150, 161-2 (1913).

The appeal in this respect must therefore be dismissed. Moreover, this Court has no authority under 28 U.S.C. § 1254(2) to treat the appeal papers as a petition for certiorari where the appeal is improvidently taken, as this one is.

## CONCLUSION

For the foregoing reasons, appellee moves to dismiss the appeal and/or affirm the portion of the judgment below to which appellant objects.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 4

JOHN W. JOHNSON, Superintendent of Public Works of the State of New York,

*Appellant,*

*v.*

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S SUGGESTION OF MOOTNESS AND MOTIONS TO DISMISS OR AFFIRM

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

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**No. 386**

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JOHN W. JOHNSON, Superintendent of Public Works of the State of New York,

*Appellant,*

*v.*

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

*Appellee.*

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## BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S SUGGESTION OF MOOTNESS AND MOTIONS TO DISMISS OR AFFIRM

### I

### As to Appellee's Suggestion of Mootness

The appellee suggests that by reason of the fact that the appellant's co-defendants in the Court below have abandoned this proceeding and that by virtue of the fact that the appellant is an agent of the Power Authority, employed in a purely ministerial capacity, he is bound by the Authority's abandonment, and the case is now moot.

But, the case is not moot and the appellant is not the agent, ministerial or otherwise, of the Authority. Although

the Superintendent of Public Works is the nominal party herein, he is the agent of, and has always acted for, the State of New York. The State is the real party in interest and the State is the real appellant herein. It is the State's title which has been vacated and annulled by the judgment of the Court below. The State of New York filed the appropriation map whereby title was vested in the State. This was in accordance with the terms of the statute (N. Y. Public Authorities Law § 1007[10]). It is there provided that the *State* shall acquire and retain *title*, provision being made for the right of the Power Authority to *possess* and *use* the land for its corporate purposes. In the event of subsequent disposition of such lands, it is provided in the statute that title shall be conveyed *"in the name of the people of the state"* on terms *"beneficial to the state"* as well as to the Authority.

The Power Authority is a creature of the State. In the "Declaration of policy" set forth in the Act which created it (Pub. Auth. Law § 1001) the New York State Legislature declared:

> (1) "Those parts of the Niagara and St. Lawrence rivers within the boundaries of the state of New York are hereby declared to be natural resources of the state for the use and development of commerce and navigation *in the interest of the people of this state and the United States.*"
>
> (2) "In order to provide for the most beneficial use of these natural resources, for the creation and development of hydroelectric power in the interest of the people of this state, * * * such natural resources, including the beds and waters of the said rivers as instrumentalities of commerce and navigation, and the beds, waters, power and power sites in, upon or adjacent to or within the water-sheds of the said rivers, owned or controlled by the people of the state, or which may hereafter be recovered by or come within their

ownership, possession and control, shall always remain inalienable to, and *ownership, possession and control shall always be vested in, the people of the state.*" (Emphasis added.)

For the purpose of effectuating its declared policy the Legislature of the State of New York created the Power Authority of the State of New York as a "*corporate municipal instrumentality of the state,*" "a body corporate and politic," and "*a political subdivision of the state*" (Pub. Auth. Law § 1002; emphasis added).

Of pertinence, also, in this regard is the provision in the enabling Act (Pub. Auth. Law § 1009) which requires that contracts for the sale of power generated by the Authority must be approved by the Governor of the State of New York. So concerned were the sponsors of the act that its provisions be carried out that they were apparently unwilling to entrust full responsibility to the discretion of the appointed board of the Authority. As a result the Governor must pass upon each contract for the sale of power by the Power Authority. The Power Authority submitted its first contract to the Governor in 1955. Upon inclusion of several amendments dictated by the Governor, the latter approved the contract as amended.

In the face of the foregoing it cannot be maintained that the appellant acted in a ministerial capacity on behalf of the Power Authority. The fact is that he acted as the legal agent of the State. His acts were the acts of the State. The State is, most certainly, legally and factually, not the agent of the Power Authority nor can its rights be prejudiced, limited, or in any way circumscribed by the latter.

It is also significant to note in this respect that the State has done nothing to indicate that it has waived its rights

or that it has acquiesced in a waiver thereof on its behalf. In the condemnation proceeding brought by the Power Authority in the Western District of New York under Rule 71A of the Federal Rules of Civil Procedure, the State of New York was not joined as a party defendant. Since that proceeding is judicial in character, dependent upon jurisdiction *in personam* as well as *in rem*, any decree entered therein will be of no significance insofar as the title of the State of New York is concerned. The State has not moved to intervene therein and, as a matter of fact, would affirmatively oppose any move to bring it in as a party defendant. Had the State voluntarily joined in the pending condemnation proceeding or failed to object to its involuntary joinder therein, it might well have been argued that it, too, had abandoned its position in the case at bar. But it has not done these things.

Although *Sprunt & Son* v. *United States*, 281 U. S. 249, 258 (1929), is authority for the principle that acquiescence in a decree by one party may render moot the issues presented by the appeal of another party from the same decree, such determination was based on the fact that "A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed."

Compare *Fishgold* v. *Sullivan Corp.*, 328 U. S. 275 (1945) in which the plaintiff had acquiesced in the judgment by accepting the money damages. The intervenor sought certiorari. In answer to a suggestion of mootness, this Court said (pp. 282-283):

> "A decision on the merits of petitioner's claim necessarily involved a reconciliation between the Act and the collective bargaining agreement or, if it appeared that they conflicted, an adjudication that one superseded the other. As we have noted, the District Court was

of the view that the collective bargaining agreement was not inconsistent with the Act. But, however the result might be rationalized, a decision for or against petitioner necessarily involved a construction of the collective bargaining agreement. That issue was adjudicated with the union as a party. Hence, if the union had thereafter instituted a separate suit for an interpretation of the agreement, it would be met with the plea of *res judicata*. And that plea would be sustained, for the prior decision was on the precise point which the union sought to relitigate and was adverse to the union. And both parties to the agreement—the union and the corporation—were parties to the prior suit. * * * The case of *Boston Tow Boat Co.* v. *United States, supra,* [321 U. S. 632] would be relevant if the collective bargaining agreement in issue was one between different parties. Then the union's interest would be merely the interest of one seeking reversal of an adverse precedent. And its 'independent right to relief' would not be increased by reason of its intervention in the cause. *Alexander Sprunt & Son* v. *United States,* 281 U. S. 249, 255. But here the rights of the union and its members under a contract with the corporation were adjudicated in a proceeding in which the union was a party. The contract was still in existence at the time of the appeal. Hence the case was not moot. And the only way the union could protect itself against that binding interpretation of the agreement was by an appeal. For then the union found itself in the position where a right of its own (*Alexander Sprunt & Son* v. *United States, supra,* p. 255) was adjudicated."

See also *In re Merrill's Estate,* 29 Cal. 2d 520, 175 P. 2d 819, 822 (1946).

A reversal by this Court would restore recognition of the State's title herein with all that legally follows upon the possession of title. The test, it has been said, in determining whether writ of error should be dismissed on account of mootness is whether the plaintiff in error, in case of

reversal, could claim or enforce the rights upon which he insists (*Haley* v. *Bailey,* 199 Ga. 486, 34 S. E. 2d 685, 686 [1945]). The test as to mootness is whether there is "an actual controversy, and adverse interests" (*Lord* v. *Veazie,* 8 How. 251, 255 [1850], quoted in *Walling* v. *Helmerich & Payne, Inc.,* 323 U. S. 37, 43 [1944]), capable of being acted upon by a judgment which can be carried into effect (*Mills* v. *Green,* 159 U. S. 651, 653 [1895]; see also *Ex parte Baez,* 177 U. S. 378, 390 [1900]; *St. Pierre* v. *United States,* 319 U. S. 41, 43 [1943]; *Walling* v. *Helmerich & Payne, Inc., supra*).

The controversy has not ceased to exist (as it did in *San Mateo County* v. *Southern Pac. R. Co.,* 116 U. S. 138, 142 [1885], in *California* v. *San Pablo & T. R. Co.,* 149 U. S. 308, 313 [1893], and in *Brownlow* v. *Schwartz,* 261 U. S. 216, 217-218 [1923]), nor has the controversy been extinguished by subsequent events (as it was in *Little* v. *Bowers,* 134 U. S. 547, 556-557 [1890], *Dinsmore* v. *Southern Express Co.,* 183 U. S. 115, 120 [1901], *United States* v. *Alaska S. S. Co.,* 253 U. S. 113, 116 [1919], *Brownlow* v. *Schwartz, supra, Chandler* v. *Wise,* 307 U. S. 474, 477-478 [1939], and *Mine Safety Appliances* v. *Forrestal,* 326 U. S. 371, 372, n. 2 [1945]). The happening of subsequent events has not rendered it impossible for this Court to grant any effectual relief (as was the case in *Mills* v. *Green, supra, Cheong Ah May* v. *United States,* 113 U. S. 216 [1885], *Tennessee* v. *Condon,* 189 U. S. 64, 70 [1903], *Security Mutual Life Ins. Co.* v. *Prewitt,* 200 U. S. 446, 449 [1906], and *St. Pierre* v. *United States, supra,* 42-43) and the questions sought to be reviewed are not in the least abstract in character.

Conceding that appellate Courts do not sit to give opinions on moot questions or abstract propositions, and assum-

ing, *arguendo,* that the questions herein are moot, the proposition that an appellate Court may, despite such fact, retain an appeal for hearing and determination if it involves questions of public interest, is supported either directly or by implication by the great weight of authority (*Southern Pacific Terminal Co.* v. *Interstate Commerce Comm.,* 219 U. S. 498, 514-516 [1910]; *United States* v. *Trans-Missouri Freight Ass'n.,* 116 U. S. 290, 309 [1896]; *Matter of Cuddeback,* 3 App. Div. 103, 108-109, 39 N. Y. Supp. 388 [3rd Dep't., N. Y., 1896]; *Matter of Adirondack League Club* v. *Board of Black River Reg. Dist.,* 301 N. Y. 219, 222, 93 N. E. 2d 647 [1950]; *Matter of Glenram Wine & Liquor Corp.* v. *O'Connell,* 295 N. Y. 336, 400, 67 N. E. 2d 570 [1946]; *People of State of New York* v. *Peale,* 145 App. Div. 798, 801, 130 N. Y. Supp. 713 [1911]; *Matter of Neary* v. *Voorhis,* 207 App. Div. 419, 421, 202 N. Y. Supp. 236 [1923]; *Willis* v. *Buchman,* 240 Ala. 386, 199 So. 892, 894, 132 A. L. R. 1179 [1940; see also Note at 132 A. L. R. 1186 *et seq.*]; *Tau Alpha Holding Corp.* v. *Board of Adjustments,* 126 Fla. 858, 171 So. 819, 820 [1937]; *State* v. *Franklin Farm Bureau,* 172 Kan. 179, 239 P. 2d 570, 579 [1951]; *Mason* v. *Commonwealth,* 383 S. W. 2d 845, 846 [Ky., 1955]; *Norton* v. *State Board of Tax Appeals,* 134 N. J. L. 57, 45 A. 2d 799, 801-802 [1946]; *Overesch* v. *Campbell,* 95 Ohio App. 359, 119 N. E. 2d 848, 850 [1953]; *Wortex Mills* v. *Textile Workers Union,* 369 Pa. St. 359, 85 A. 2d 851, 857 [1952]; *Industrial Commission* v. *State Federation of Labor,* 107 Colo. 206, 110 P. 2d 253, 254 [1941]; *Trust Company of Chicago* v. *Covnot,* 3 Ill., 2d 553, 121 N. E. 2d 779, 780 [1954]; *Morrison* v. *State,* 252 S. W. 2d 97, 100 [Mo., 1952]; *In re Suspension of License By Oregon Liquor Control Comm.,* 180 Or. 495, 177 P. 2d 406, 408 [1947]; *Morad* v. *Wyoming Highway Dep't.,* 66 Wyo. 12, 203 P. 2d 954, 957 [1949]). In *Matter of Rosenbluth* v.

*Finkelstein,* 300 N. Y. 402, 91 N. E. 2d 581, the Court said (p. 404):

> "Although the appeal has become moot and academic, we refrain from dismissing it because of the importance of the issue presented. * * * [T]he question is one of major importance and, because it will arise again and again, one that invites immediate decision."

See also *Board of Examiners, etc.* v. *Marchese,* 49 Ariz. 350, 66 P. 2d 1035, 1037 (1937) and *Wise* v. *First Nat. Bank,* 49 Ariz. 146, 65 P. 2d 1154, 1156 (1937).

With regard to the public importance of the questions presented, the Court's attention has been drawn to the chaos which will ensue respecting the validity of past and contemporary acquisitions of Indian lands, respecting the applicability of the Indian Intercourse Act to the State of New York, and respecting the acquisition of non-Indian lands by the State of New York, pursuant to N. Y. Public Authorities Law § 1007 (10) and Highway Law § 30 (Jurisdictional Statement, pp. 12-13). This statement was truly prophetic. In *St. Regis Tribe of Mohawk Indians* v. *State of New York,* 5 N. Y. 2d 24 (1958) a motion was made in the Court of Appeals of the State of New York for re-argument, based in part on the decision of the Federal Court of Appeals in the instant matter. The motion was denied on October 9th, but it would come as no surprise if the next step in the proceeding involved an application to this Court for certiorari. In *State Tax Commission* v. *Barnes,* a proceeding pending in Franklin County, New York, the St. Regis Indians have moved to have themselves declared immune to the payment of the State income tax, basing their position on the determination of the United States Court of Appeals in the instant proceeding. There has been a decision in this matter in favor of the State, but an appeal is anticipated. As to the situation respecting non-Indian lands, it may be noted that in five summary (dispossess)

proceedings[1], commenced under the authority of Highway Law § 30, subd. 12, the right of the petitioner (Superintendent of Public Works) to maintain the proceedings was challenged. The petitions were granted and final orders issued. The Court wrote an opinion.[2] In drawing this Court's attention to these occurrences, our purpose has been to demonstrate the substantiality of the questions presented. Review by this Court is not sought merely for the purpose of having this Court declare principles or rules of law for the government of future cases, but which cannot affect the matters in issue in the instant case. The matters in issue in the instant case involve the title of the State of New York. The Court of Appeals in the instant case has held that by virtue of the applicability of the Indian Intercourse Act to the State of New York the latter does not possess the inherent sovereign power to acquire Indian reservation lands. As a result, it has set aside and annulled the title acquired by the State of New York. Certainly this is an issue which is very much alive and which can be seriously affected in the instant case by a determination of this Court.

## II

### As to Appellee's Motion to Affirm Without Further Argument

Appellee moves to affirm the portion of the judgment sought to be reviewed on the ground that the questions presented are so unsubstantial as not to need further argument. Appellee bases this motion on the contentions:

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[1] *Superintendent of Public Works* v. *Paonesso; Same* v. *Broda; Same* v. *Ungaro; Same* v. *VeRost; Same* v. *Banach* (County Court, Niagara County).

[2] The opinion of the County Court of Niagara County (not yet reported) is set forth in Appendix A, *infra*.

(1) That the United States possesses paramount power to control and govern the territory reserved and held by Indians, including tribal lands in the State of New York; and

(2) That the Federal Government occupies a special position as the guardian and protector of Indian tribes, including those resident in the State of New York.

But the appellant's position in the first place, assuming *arguendo* that exclusive jurisdiction in the Federal Government is present, is that the Federal Government has not acted to inhibit State action in the taking of Indian lands by eminent domain. No federal statute is now on the books which has that inhibitory effect. It is contended by the appellant (see Jurisdictional Statement) that 25 U. S. Code §§ 177 and 233 are not applicable to the State of New York insofar as such restraining effect is claimed. The Court of Appeals in the instant case has, of course, disagreed with the appellant's contention. It is submitted that the appellant has a right *fully* to be heard by this Court on this important and substantial question.

Secondly, assuming *arguendo* the paramount jurisdiction of the Federal Government, the appellant has questioned the right of the Federal Government thereby to impair the sovereignty of the State. (See Jurisdictional Statement, p. 12.) Certainly, this question is one which is not only of crucial importance in the disposition of the case at bar, but is a question of transcendent importance in the consideration of the contemporary legal mores respecting the relationship of Nation and State. As to this point, too, *full* argument should be heard by this Court.

It would not only be an injustice to deprive the appellant of its statutory right fully to be heard by this Court,

but it is unfair to the Court itself to ask it to rule on the substantive aspect of these questions on the basis of mere outlines or summaries of proposed arguments. It is submitted that the outline of the appellant's proposed argument, as set forth in the Jurisdictional Statement, is sufficient to convince the Court that it ought to note jurisdiction herein. The full arguments by both parties which will later be addressed to the Court will, it is presumed, be sufficient to enable the Court to render a decision on the merits of the case. Appellant is entitled, as a matter of statutory right, to an opportunity to present such full argument. He ought not to be summarily deprived of such right.

## III

### As to Appellee's Motion to Dismiss as to the Second Question Presented

Appellee moves to dismiss the appeal insofar as the second question presented is concerned on the ground that that question is not within the appeal jurisdiction of this Court as invoked by the appellant. The question involved is: "Is acquisition of title by eminent domain under the procedure set forth in the New York Public Authorities Law, Art. 5, Tit. 1, § 1007 and New York State Highway Law § 30 repugnant to 16 U. S. Code § 814 (Federal Power Act § 21)?"

A summary of the appellant's position on this question is set forth in the Jurisdictional Statement (pp. 10-12). To that statement may be added the argument advanced by Judge Page, in his opinion in the summary proceedings heretofore referred to, to the effect that the use of the word "may" in 16 U. S. Code § 814, establishes that the Federal Power Act does not create an exclusive pro-

cedure and that the statute is not mandatory in character (Appendix A, *infra*). It is also pertinent to observe that it was with respect to this point that Judge SWAN dissented from the majority in the Court below.

The appellee criticizes the appeal on this question on the alleged ground that the Court of Appeals did not "*squarely*" find that the State procedural statutes were repugnant in their operation and effect to Federal Power Act § 21, but that the Court simply held, "as a matter of construction of Section 21 of the Federal Power Act, that Congress had not chosen the procedure set forth in the two New York statutes." But this is merely the other side of the same coin. Implicit in the determination of any question involving the possible repugnance of one statute to another is the necessity for analyzing and construing each of the statutes. If the Court below had so construed § 21 as to authorize the State procedure it would in effect, have held that the New York statutes were not repugnant thereto. If the Court below had construed the New York statutes as being in compliance with § 21 the same result would have ensued. As it was, it construed § 21 as not authorizing the New York statutory procedure and it construed the New York statutes as not being in compliance with § 21. The point is that the determination of the Court below involved the necessity of construing both the Federal statute and the State statutes. But this was only part of the judicial rationale which led to the ultimate judicial determination of repugnancy. Appellee has confused the *ratio decidendi* (repugnance) with the rationale (construction of the Federal and State statutes) which supported it.

It is submitted that whether you call it "Head" or "Tail" the character of the coin is not thereby changed.

It is not necessary that the Court hold squarely or categorically that one statute is repugnant to another; it is sufficient if that is the effect of its decision. Certainly, the effect, at least, if not the plain meaning, of the decision of the United States Court of Appeals is that the New York statutory procedure is repugnant to Federal Power Act § 21.

## CONCLUSION

For the foregoing reasons we submit that this Court should:

(1) Reject the appellee's suggestion of mootness;

(2) Deny appellee's motion to affirm the portion of the judgment below sought to be reviewed;

(3) Deny appellee's motion to dismiss the appeal insofar as the second question presented is concerned;

(4) Note jurisdiction of the appeal; and

(5) Allow full argument on both of the questions which have been presented.

October 24, 1958.

Respectfully submitted,

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Paxton Blair
Solicitor General

Julius L. Sackman
Associate Attorney
*of Counsel*

## APPENDIX A

STATE OF NEW YORK

COUNTY COURT—NIAGARA COUNTY

In the Matter of Summary Proceedings by the SUPERINTENDENT OF PUBLIC WORKS, as Agent of POWER AUTHORITY OF THE STATE OF NEW YORK,

*against*

RAFFAEL PAONESSO, also known as RAFFAELE PAONESSA.

SAME,
*against*
WALTER BRODA and MARTIN BRODA.

SAME,
*against*
JOSEPH V. UNGARO and MARY L. UNGARO.

SAME,
*against*
MARTIN VE ROST.

SAME,
*against*
MICHAEL BANACH, JR. and DOROTHY BANACH, his wife.

### Decision

BY JUDGE PAGE

OCTOBER 17, 1958

The premises which the petitioner seeks to obtain immediate possession of consist of improved real property in the

County of Niagara and are required for the improvement and development of the Niagara River for use in connection with the Niagara Power Project of the Power Authority of the State of New York, hereinafter referred to as the Power Authority.

There were five summary proceedings brought by the petitioner before this Court and the same defense was set forth by the respondents herein, therefore all five of these summary proceedings are to be treated as one.

The proceedings were instituted by the Superintendent of Public Works as agent* of the Power Authority of the State of New York against the respective respondents to obtain the possession of the premises described in each of the petitions, in accordance with the provisions of § 30 of the Highway Law, as made applicable by Article V, Title 1, of the Public Authorities Law of the State of New York.

Upon the return date of the summary proceedings, motion was made by counsel for the petitioner to strike out the answers as being sham and frivolous, and motions were also made by counsel for the respondents to strike out the petition as insufficient in law.

The major question brought before this Court is "whether or not the petitioner was authorized by law, or by statute, to obtain possession of the lands described in the petition."

It is not disputed that the waters of the Niagara River are under the jurisdiction and control of the Federal

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* For the purposes of a summary proceeding, which involves the recovery of *possession*, the Superintendent could properly be designated as the agent of the Power Authority, because the latter is the entity which is entitled to possession under the statute (Pub. Auth. Law § 1007 [10]; *supra*, p. 2).

Government and for the State of New York to utilize the United States' share of such waters, permission would have to be granted by the Federal Government. The Power Authority is a state instrumentality created by Chapter 772 of the Laws of 1931, and the Power Authority Act has been amended in subsequent years and is found in the Public Authorities Law, § 1000 and following sections, and until 1958, it was available only for the purposes of the St. Lawrence River development. Prior to 1958, § 1007 of the Public Authorities Law did not refer to the development of the Niagara River but contained the following provisions in Subdivision 7 of that section:

> "The authority may, at its option, acquire such real property within the State of New York, under the general condemnation law or, in the event it is a licensee of the federal power commission it may acquire such real property as is necessary for its purposes through the exercise of the right of eminent domain, as provided in section twenty-one of the federal power act, as amended."

The Power Authority applied to the Federal Power Commission under Project No. 2216 for a license for the development of the Niagara Power Project and an order was issued January 30, 1958 which directed the issuance of such a license.

It is the contention of the respondents that the Power Authority is strictly limited to the rights and powers of eminent domain specifically set out in the Federal Power Act and that the petitioner cannot avail itself of the powers and privileges of eminent domain set out in the statutes of the State of New York.

It is their claim that the power of eminent domain in this case stems from a license issued to the petitioner, pursuant

to Public Law 85-159, 71 Stat. 401, which are now § 836 (a) of Volume 16 of the USCA, and they further contend that one of the conditions of the granting of such a license was contained in § 814 of the United States Code and referred to as § 21 of the Federal Power Act as amended, and that the petitioner, by virtue of this section, became vested with the governmental power of eminent domain in the District Court of the United States for the district in which such land or the property may be located, or in the State courts.

The Power Authority of the State of New York is an agency of the State and by act of legislature has been granted the power of eminent domain. The Legislature, by amending § 107, subdivision 10, has given to the Power Authority an additional method of exercising that power of eminent domain. The Federal Power Act by its very wording does not create an exclusive law of eminent domain for any licensee. The wording of the statute involved, § 814 of the Power Act, states as follows:

> "When any licensee cannot acquire by contract or pledges * * * it *may* acquire the same by the exercise of the right of eminent domain in the District Court of the United States for the district in which such land or other property may be located or in the State courts. * * *"

The use of the word "may" indicates that this is not a mandatory statute and merely gives to the licensee a method which can be used if the licensee desires to exercise its right of eminent domain in that way. In other words, this section is not an exclusive law of eminent domain but is complementary to the state statutes and an agency of the state which accepts a license can proceed either under the state's own power of eminent domain or under the

statute above referred to. In this proceeding the state agency has elected to proceed under the statutes of the State of New York. In *Oakland Club* v. *South Carolina PSC*, 110 P. 84, the Court stated in effect that the state agency has an election to exercise the power of eminent domain either under the specified enumerations of the Federal Power Act or under the broader provisions of the Eminent Domain Act of the State of South Carolina. This is a well-established rule.

The Federal statute of eminent domain merely gives to a licensee that does not have the power of eminent domain such a right but it is not intended to interfere with the power of eminent domain already existent in a state agency and the state does not surrender such power of eminent domain by the acceptance of a license.

Nowhere in the license granted by the Federal Power Commission is there any limitation with respect to the manner in which property may be acquired nor is there any actual limitation insofar as the Federal Power Commission Act is concerned. There is nothing in the law which suggests that the State of New York ever intended, nor did it ever surrender its sovereign power of eminent domain by authorizing and permitting the Power Authority of the State of New York to accept a license. The provisions of § 814 of the Power Act conferring the right of eminent domain upon licensees thereunder should be construed together with the laws of the State of New York in determining the power of eminent domain possessed by the Power Authority which was licensed under the Federal Power Act. *Burnett* vs. *Central Nebraska Public Power and Irrigation District*, 147 Neb. 458, 23 N. W. (2d) 661,

held substantially as stated above in reference to a Nebraska statute of condemnation.

Tne so-called Appropriation Act under which the property in question has been appropriated has been passed upon by the Courts of the State of New York. In *Cuglar* vs. *Power Authority*, 4 Misc. (2nd) 879, the Court carefully reviewed the power of the authority to take pursuant to Subdivision 10 of § 1007 of the Public Authorities Law of the State of New York. It is true that had to with the development of the St. Lawrence River, and it discussed that section together with the provisions of the license granted to the State of New York, and ruled that the procedure was in proper order. And in this case, as well as the case of *St. Regis* against *The State*, 5 N. Y. (2d) 24, the Court of Appeals sustained the proposition that the Power Authority in constructing the St. Lawrence Power Project was performing a state function and was entitled to employ the state's power of eminent domain. § 1001 of the Public Authorities Law contains a declaration of policy which states in part and in effect that the St. Lawrence and Niagara Projects are to be constructed for state purposes, and § 1002 creating the Power Authority of the State of New York states:

> "* * * and which shall have the powers and duties hereinafter enumerated, together with such others as may hereafter be conferred upon it by law."

It is obvious that the state never surrendered nor did it intend to surrender its power of eminent domain by the acceptance of a license from the Federal Power Commission.

*Appendix A*

The respondents call the Court's attention to a case decided in the United States Court of Appeals for the Second District July 24, 1958 involving the Tuscarora Nation of Indians against the Power Authority of the State of New York in which the Court questioned the validity of the procedure followed by the Power Authority in appropriating the lands of the Indian nation. The procedure followed was identical with the procedure followed in these cases. Statements were made by that Court stating that the procedure was invalid, but the case was before the Court to determine the proper method of taking the lands of the Tuscarora Nation of Indians and the validity of the Appropriation Act was not in question. The case is not clear when referring to this section as to whether or not their ruling is applied strictly to the problem involved in the taking of Indian lands.

Can a Federal Court pass upon the validity or constitutionality of a state statute which is not squarely before it? I think not. In the above case relied upon by respondents, the validity and constitutionality of the so-called Appropriation Act was not before the Court, the only question being before that Court is the taking of Indian lands. It is the Court's opinion that there was no declaratory decision by that Court as to the validity of the Appropriation Act which is binding upon the Courts of the State of New York.

The Court realizes that speed and urgency in the development of the Niagara Power Project is important to the State of New York and the people of Western New York, but the Court is also aware that it is entrusted with

the protection of the rights of the citizens of this State, and speed and urgency is not a sufficient excuse to abridge the rights of those citizens.

In the opinion of the Court, the rights of the citizens under the Appropriation Act are fully protected. § 30 of the Highway Law provides under subdivision 13 a method of a payment of sixty per cent of the amount determined by the Superintendent of Public Works to be the value of such claim, reserving to such owner or owners, however, the right to file such claim with the Court of Claims, or if the claim has been filed, reserving the right to prosecute said claim. Thus the respondents have the right to receive a partial payment immediately and a right given and reserved to them to proceed in the Courts of the State of New York to recover what they feel is a just and proper compensation.

It is the opinion of this Court that the procedure followed by the State of New York in the appropriation of respondents' land is a proper and valid procedure.

It is the contention of the respondents that the petition is insufficient as it fails to allege that funds have been made available by the Authority for the payment of the costs and expenses of the appropriation. It is true that the making of funds available may have been a prerequisite to the initiation of the appropriation proceeding, but it is not a prerequisite to the bringing of summary proceedings to remove the occupants and does not have to be alleged in the petition. The only requirement is proof that title is vested in the State and that the owner or occupant who is sought to be removed has been served with a forty-day notice to quit.

In accordance with this opinion, the motions of the respondents are hereby denied and the motions made by the petitioner also denied, and it is directed that the matter be returned to this Court for trial of any issues of fact which may be raised in the summary proceedings before this Court.

October 17, 1958.

J. RICHMOND PAGE,
*Acting County Judge, Niagara County.*

APR 28 1960
JAMES R. BROWNING, Clerk

(547)

# Supreme Court of the United States

No. 4—October Term, 1959

JOHN BURCH McMORRAN, Superintendent of Public Works of the State of New York,

*Appellant,*

*v.*

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

*Appellee.*

## MEMORANDUM

April 25, 1960.

LOUIS J. LEFKOWITZ,
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Paxton Blair,
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Julius L. Sackman,
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*of Counsel.*

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

IN THE

# Supreme Court of the United States

No. 4—October Term, 1959

JOHN BURCH McMORRAN, Superintendent of Public Works of the State of New York,

*Appellant,*

*v.*

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This memorandum is filed in response to the direction of the Court, as set forth in the letter of its Clerk dated April 18, 1960.

## I.

### As to the question of mo[illegible]ness.

The decision and the opinion in *Federal Power Commission, et al.* v. *Tuscarora Indian Nation,* Nos. 63 and 66, October Term, 1959, neither add to nor detract from the situation respecting the question of mootness. They merely restore the factual situation which existed at the time the appellee made its suggestion of mootness.

That situation was that the Power Authority had abandoned its proceedings under the State's power of eminent domain and had elected to acquire the property by proceedings in the Federal District Court under Federal Power Act § 21. There is nothing which we desire to add to that which has already been stated on the question of mootness in our brief in opposition to appellee's suggestion of mootness other than to observe that if the Court of Appeals for the Second Circuit was wrong in holding that the Indian Intercourse Act was applicable to the State of New York, then the State of New York has become the owner in fee, by virtue of the instant appropriation, of the lands which are the subject of the condemnation proceeding in the Federal District Court. Under these circumstances, the State of New York, and not the Tuscarora Nation of Indians, will be entitled to payment of the compensation which will be awarded by the District Court, but the State will be subject to liability for the value of the land, in favor of the Tuscarora Nation—the value to be determined either by voluntary agreement or by award of the New York State Court of Claims.

In the event that the decision of the United States Court of Appeals, Second Circuit, brought here by the instant appeal, is held by this Court to have been erroneous, the condemnation proceeding in the United States District Court for the Western District Court, begun when the decision of the United States Court of Appeals, Second Circuit, was handed down, constitutes a completely futile and superfluous gesture.

## II.

## A word as to the merits.

In our jurisdictional statement (page 8) reference was made to *St. Regis Tribe of Mohawk Indians* v. *State of New York,* 5 N. Y. 2d 24 (1958), in support of the proposition that the provisions of the Indian Intercourse Act do not apply to the State of New York. This position is, of course, diametrically opposed to that of the United States Court of Appeals, Second Circuit, in the instant case, thus emphasizing the unabated importance of our appeal from that decision.

The *St. Regis* case involved the *purchase,* in 1796, of Indian land by the State. The instant appeal involves the acquisition of title to Indian land by the State through appropriation proceedings. The St. Regis Tribe in applying for certiorari rested their case on this conflict between the State and the federal courts. Our answering brief stressed the want of a grievance in the St. Regis Tribe, since they had been twice paid for what the State acquired from them; but it is true that the New York Court of Appeals did hold the Indian Intercourse Act inapplicable to the State. By denying the petition for certiorari (*St. Regis Tribe of Mohawk Indians* v. *New York,* 359 U. S. 910, No. 613 [1959]) and subsequently denying the petitioner's motion for leave to file a petition for re-hearing (*St. Regis Tribe of Mohawk Indians* v. *New York,* 359 U. S. 1015, No. 613 [1959]), this Court seems to have aligned itself with the New York Court of Appeals on this question.

To leave undetermined which Court—the New York Court of Appeals or the United States Court of Appeals,

Second Circuit—has correctly interpreted the powers of the State of New York, under circumstances and conditions which may readily recur, would be an unfortunate prolongation of dubiety in a field (title to land) where certainty should prevail.

## CONCLUSION

**Probable jurisdiction should be noted.**

April 25, 1960.

Respectfully submitted,

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PAXTON BLAIR,
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JULIUS L. SACKMAN,
Principal Attorney,

*of Counsel.*

FILED
MAY 3 1960
JAMES R. BROWNING,

# SUPREME COURT OF THE UNITED STATES

NO. 4—OCTOBER TERM, 1959

JOHN BURCH McMORRAN, Superintendent of Public Works of the State of New York,

*Appellant,*

*v.*

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF AMICUS CURIAE OF POWER AUTHORITY OF THE STATE OF NEW YORK

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10 Columbus Circle,
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May 3, 1960.

# Supreme Court of the United States

NO. 4—OCTOBER TERM, 1959

JOHN BURCH McMORRAN, Superintendent of Public Works of the State of New York,

*Appellant,*

*v.*

TUSCARORA NATION OF INDIANS, also known as TUSCARORA INDIAN NATION,

*Appellee.*

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF AMICUS CURIAE OF POWER AUTHORITY OF THE STATE OF NEW YORK

This brief is filed pursuant to Rule 42(4) of the Revised Rules of this Court on behalf of Power Authority of the State of New York, a political subdivision of the State (New York State Public Authorities Law, Article V, Title 1, Section 1002) by its authorized law officer.

The Authority is interested because the appeal is from a judgment affecting land needed by the Authority for a power project which it is constructing as a licensee of the Federal Power Commission. Our purpose is to advise this Court of facts relevant to the question of mootness not stated in either the memorandum dated April 25, 1960 presented to this Court by appellant or in the letter dated April 26, 1960 sent to this Court by appellee. Such facts relate to events which in part occurred after the submission of such memorandum and letter.

## Facts

The judgment of the Court of Appeals for the Second Circuit, a part of which is the subject of this appeal, did the following:

1. Declared that the Authority as a licensee of the Federal Power Commission is authorized to condemn appellee's land needed for the Niagara Power Project pursuant to Section 21 of the Federal Power Act in either state or federal courts.

2. Declared that appellant's action in taking steps to acquire appellee's land in the name of the State of New York at the request and sole expense of and on behalf of the Authority as such licensee by the appropriation method of procedure pursuant to Section 1007 of the New York Public Authorities Law and Section 30 of the New York Highway Law did not conform to the requirements of Section 21 of the Federal Power Act.

3. Declared that in the absence of affirmative federal authorization the state lacks power to acquire Indian land because Sections 177 and 233 of Title 25 of the United States Code forbid its doing so.

4. Vacated and annulled the proceedings taken by appellant to appropriate the property.

Appellant appealed from the judgment except insofar as it declared that the Authority has a right to condemn appellee's land pursuant to Section 21 of the Federal Power Act.

The Authority made no attempt to obtain a review of the part of the judgment unfavorable to it but on the contrary immediately started an action to condemn appellee's land needed for its power project in the United States District Court for the Western District of New York. That action is pending and pursuant to an order of the District Court the Authority has obtained possession of the land and is carrying on construction activities on it.

Section 1007 (10) of the New York Public Authorities Law authorizes the Authority to make conveyance by quitclaim deed in the name of the state of property acquired by appropriation on its behalf when it deems it to be in the best interests of itself and the state to do so. Pursuant to such authorization, the Authority by an instrument dated April 26, 1960 quitclaimed to appellee whatever right, title and interest the state acquired in the appropriation proceedings. The stated consideration is appellee's agreement not to sue the state in the New York Court of Claims for damages growing out of the appropriation, such consideration to be evidenced by appellee's acceptance of the instrument. Such instrument was delivered to appellee's counsel and accepted by him on its behalf.

## Suggestion of Mootness

We are cognizant that it is important to the state for this court to determine the question of the state's right to acquire Indian land within its borders for public purposes as it has been doing for 150 years. In fact, we understand that the state's reconstruction of a highway through the St. Regis Reservation in St. Lawrence County is presently blocked by some residents of the reservation upon the claim that the state has no right to exercise eminent domain over the necessary land. We submit, however, that the instant appeal is moot and that the question of the state's power of eminent domain over Indian land should be determined by this court in a different proceeding.

We respectfully suggest that the judgment below to the extent that it was appealed from be set aside on the ground of mootness.

Respectfully submitted,

THOMAS F. MOORE, JR.
*General Counsel*
Power Authority of the State of New York
10 Columbus Circle
New York 19, N. Y.

Dated: May 3, 1960

## McMORRAN, SUPERINTENDENT OF PUBLIC WORKS OF NEW YORK, *v.* TUSCARORA NATION OF INDIANS, ALSO KNOWN AS TUSCARORA INDIAN NATION.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 4. Decided May 16, 1960.

Judgment vacated and case remanded to the District Court with instructions to dismiss the complaint as moot.

Reported below: 257 F. 2d 885.

*Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Julius L. Sackman* for appellant.

*Arthur Lazarus, Jr.* and *Eugene Gressman* for appellee.

*Thomas F. Moore, Jr.* for the Power Authority of the State of New York, as *amicus curiae.*

PER CURIAM.

Upon the suggestion of mootness, the judgment of the Court of Appeals is vacated and the case is remanded to the District Court with instructions to dismiss the complaint as moot.